IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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AARON L. HARTMAN	:	CIVIL ACTION NO. 09-5028
	:	
v.	:	Philadelphia, Pennsylvania
	:	March 4, 2010
NATIONAL BOARD OF MEDICAL EXAMINERS	:	11:47 o'clock a.m.
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PRELIMINARY INJUNCTION HEARING - DAY 4
BEFORE THE HONORABLE LOUIS H. POLLAK
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES:

For the Plaintiff:	CHARLES WEINER, ESQUIRE Law Offices of Charles Weiner 179 North Broad Street Doylestown, PA 18901
For the Defendant:	JANE E. LEOPOLD-LEVENTHAL, ESQUIRE Eastburn & Gray, PC 60 East Court Street P.O. Box 1389 Doylestown, PA 18901
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(Proceedings recorded by For the Record Gold digital sound recording; transcript provided by above transcription service.)

(The following occurred in open court at 11:47 o'clock a.m.)

MR. WEINER: Good morning, your Honor.

THE COURT: How are you today? Please sit down.

MS. LEOPOLD-LEVENTHAL: Good morning, your Honor.

(Discussion held off the record.)

THE COURT: All right. We now move to defendant's case as I understand it?

MS. LEOPOLD-LEVENTHAL: Yes, I understand that the plaintiff has rested, and before beginning our case, I would like to, with your Honor's permission, make a motion to dismiss the preliminary injunction, if the Court will indulge?

THE COURT: Well, if you want to argue it, I mean --

MS. LEOPOLD-LEVENTHAL: Yes, please.

The standards, of course, are rather explicit, and certainly the plaintiff and the defendant agree upon the standards. And what the Court needs to consider and evaluate, in addressing whether or not the plaintiff has met his burden in establishing the elements for injunctive relief, the first, of course, is the likelihood of success on the merits.

THE COURT: Right.

MS. LEOPOLD-LEVENTHAL: And the focus here, and I believe the focus of the plaintiff's case has been, Mr.

Hartman would like this Court to order, and for the NBME to be required, to give him his preferred accommodations.

What is required under the law is that Mr. Hartman be given reasonable accommodations.

Now, anyone taking any sort of examination would like to have whatever accommodation it is that would best assure that individual's success on that examination. Unfortunately, that is not what the law requires.

We heard Dr. Tetnowski explain that when Mr. Hartman first came to him, Mr. Hartman had the text to speech device already. He was asked to evaluate his speech. And ultimately Dr. Tetnowski recommended that Mr. Hartman be permitted to use that device, because that device would best assure Mr. Hartman's success on the examination.

And in evaluating what is a reasonable accommodation, as compared with the preferred accommodation, we have to look at Mr. Hartman's past. He spent four years in medical school, and by his own admission, he evaluated, he examined, he spoke with dozens upon dozens of patients in every different specialty that was required in medical school. And he did that with the exception of three patients with whom he did use the text to speech device, only with the use of his spoken language.

In addition, Mr. Hartman testified that he is now engaged in, participated in, nine different interviews with

nine different medical schools for residency programs. By his own admission, he utilized the text to speech device for only one of those nine residency interviews, and this was all during the period of time where Mr. Hartman testified that he believes his speech dysfluency has been at its most severe.

And so you have to ask yourself, Why is it that Mr. Hartman has come to this court and asked for an accommodation different from the one he's used throughout his entire life, which has been more time, and is asking this Court to order something completely different? And that is because he is looking for whatever accommodation it is that will best assure that he succeeds on the Step 2 CS examination.

Unfortunately, that's not the standard. The plaintiff possesses a very heavy burden. He is asking this Court to enter a mandatory injunction. This injunction would not maintain the status quo, but it would alter the status quo. He's asking you to order something that's going to change where we are today.

And in addition to establishing likelihood of success on the merits, which we do not believe he has come close to meeting, the plaintiff is also required to establish some sort of irreparable harm. In the plaintiff's brief, in support of their injunction request, they suggest that this element is presumed. That this Court should presume that because the NBME clearly violated a statute.

I would submit that that is not the case, and we are required to analyze what the actual irreparable harm is that the plaintiff is suggesting he will suffer. And I listened to his direct examination very closely, and he brought up two elements.

The first was, I believe, that he believed he would be required to pay an additional $25,000 to maintain his status in medical school, in order to then take the Step 2 CS examination and endeavor to pass that. And that was the first element of the harm.

The second, and I believe the plaintiff's focus, is that if this Court doesn't grant this injunction at this time, Mr. Hartman will be delayed. Not denied, but delayed, and that's a huge distinction from entering into his residency program.

We've talked a little bit about March 18th. March 18th is the match day. They call it match day, March 18th. That's the day that Mr. Hartman, and all of the other applicants for residency programs across the country, will find out whether or not they have been matched into a particular residency program.

March 18th is two weeks from today. Nothing about this proceeding, these hearings, or the Step 2 examination is going to impact or effect match day. Mr. Hartman has done everything he needs to do, including participation in the

interviewing process in order to be matched on March 18th. Regardless of his having passed or failed the Step 2 as of that date, he will know whether he has been matched in a program.

Now, of course, he will have to ultimately pass the Step 2 CS examination in order to begin the residency program in July, but I'd bring up that point because there's no magic to the date of March 18th, which is two weeks from today.

When we talk about delay in entering a profession, delay in entering a professional school, there are many, many, many Federal Court decisions which have addressed this exact issue, and they have all agreed that delay in entering a profession, or delay in beginning law school or medical school, does not constitute irreparable harm.

Added to that in this case, we have a plaintiff, who in his first year of medical school, testified he had family issues with respect to a grandmother who was in poor health. He ultimately withdrew from the first year of medical school, receiving incompletes in his courses, and he delayed his own completion by a full year.

In addition to that, Mr. Hartman testified that he failed the internal medicine written examination in medical school, and that also delayed his completion another four months, which I guess is another half a year. So by his own conduct, and his own decisions, Mr. Hartman, himself, has

delayed his entering into the residency program.

And that's important, but that's not the issue. The issue is what is the legal standard, and the legal standard doesn't require or doesn't allow a court to find that a plaintiff has been irreparably harmed simply because he will be delayed in entering a particular program.

Added to that is the fact that the NBME has offered Mr. Hartman now double time accommodations. Mr. Hartman testified that in medical school he received double time or time-and-a-half. He took the exam with time-and-a-half, he didn't pass. He passed two of the two subcomponents. He's now been offered double time, and it is his choice, his election, that he didn't any time after September 29th, when this was offered to him, opt to take that examination, and see how he made out with the double time.

Yes, it's not great to fail the examination one or two times, and then pass it on the third, but you have that opportunity, and he already didn't pass it the first time. He chose to --

THE COURT: If you don't pass it on the third, you're in substantial difficulty, are you not?

MS. LEOPOLD-LEVENTHAL: Not necessarily, and we don't have anyone here from Stoneybrook. The letter from Stoneybrook, which has been introduced into evidence says, It's possible that you'll be thrown out, but you can ask for

a waiver of that.

My suspicion is that given Mr. Hartman's speech dysfluency, he might just be able to get that waiver, but I can't guess at that.

But what really is the harm in taking the test a second time with the double time? The same accommodation you've had throughout your life and the same assistive device, that is additional time.

Mr. Hartman had 15 minutes under a standard administration. He was given another seven-and-a-half minutes as an accommodation. NBME offered to double that.

And what I tried to illustrate yesterday is that the Step 2 CS exam includes a lot of different components. Yes, one of those involves Mr. Hartman speaking. Another components involves the standardized patient speaking to him. That's not slowed at all by his speech. It involves Mr. Hartman recording information. That aspect isn't slowed by his speech. Diagnostic examinations. That isn't slowed by his speech. So a double time accommodation gives him twice as much time really to address only one of the many components that are included in that examination.

And, so, I think it's important and illustrative that Mr. Hartman has decided not to take the examination, and I suppose they'll say he didn't want two strikes against him, but to come to this Court and ask you to order a mandatory

injunction, without having first taken that step, is not responsible.

THE COURT: Well, let me inquire.

What is the defendant's rationale for providing double time?

MS. LEOPOLD-LEVENTHAL: The defendant's rationale for providing either time-and-a-half or double time is they have concluded that Mr. Hartman has a disability. And they have evaluated what the most reasonable way to accommodate that disability is without altering the examination.

So, for example, if the NBME decided to give Mr. Hartman, you know, quadruple time, or an hour for each patient encounter, that, they will testify, would alter the examination. That is not going to mimic a patient-doctor encounter. So there's a point at which it becomes unreasonable to allow additional time.

But as you will hear, there have been other test-takers who have had a stutter, and they have been accommodated with additional time only. That's the only accommodation that anyone with a stutter has received. And their rationale is that the double time does not alter that examination. Does not alter the skills. Does not alter it so much that it's no longer evaluating what its supposed to evaluate, and --

THE COURT: That leads me -- your response -- it

leads me to think that I really have to hear your witnesses. That I can't decide the motion just on the basis of what's before me on the plaintiff's case.

MS. LEOPOLD-LEVENTHAL: That's fair enough.

And if I could just make my final point, which is the last element that the injunctive cases examine is, Does the public interest favor this?

The entire focus or thrust of the plaintiff's case so far has been on Mr. Aaron Hartman. The United States medical licensing examinations aren't designed to help a test-taker. They're not designed for doctors. They're not designed for any particular person. This is an examination that is then, once you pass it, submitted to the State Licensing Boards. The licensing boards then rely upon this examination to conclude that you have demonstrated the skills necessary to be a physician.

The entire focus of this case has been on Mr. Hartman, but the public interest here is really what is at the heart of this case, and what our witnesses are going to testify about. So the focus is not on whether this is or isn't fair to Mr. Hartman, but what are we doing to the public in licensing a physician, giving them now a ticket to practice medicine, when they haven't met the minimum competencies.

And that's the balance. That's the evaluation. And

I heard nothing in the plaintiff's case about what impact granting this accommodation is going to have on the general public who now has a physician who's been licensed and who we maintain would be licensed, having been given a preferred accommodation, that fundamentally alters the entire examination. Mr. Hartman would then have a license to practice any type of medicine he wanted, really having passed the examination through an accommodation that just isn't representative.

THE COURT: Would it not be up to the licensing agencies, in the various states, to determine whether a score received by Mr. Hartman, with his accommodation, qualified him in that state, an applicant for a medical license?

MS. LEOPOLD-LEVENTHAL: No. All they will see is pass and they will assume --

THE COURT: Why?

MS. LEOPOLD-LEVENTHAL: I'm not sure I understand your question.

THE COURT: I mean, when you say, All they'll see is passed, they'll be no description of the --

MS. LEOPOLD-LEVENTHAL: No.

THE COURT: -- task?

MS. LEOPOLD-LEVENTHAL: No.

THE COURT: Why not?

MS. LEOPOLD-LEVENTHAL: And oftentimes, you know,

applicants have a condition -- let's say ADHD -- and they ask for additional time on Step 1 or Step 2, and they're granted time-and-a-half or double time in order to take that test. And plaintiffs scream and yell about not wanting anything on the examination to reflect that they passed this examination through the aid of some sort of accommodation. They want a pass. They don't want to star next to it saying, Well, he's not really qualified. He has ADHD and we gave him time-and-a-half.

All they receive is a pass. And all the licensing boards, the State Licensing Boards will receive in this case is a P. He passed the examination. That's it. And they rely upon that, of course.

THE COURT: When the examination results are sent to the medical school, and/or to the licensing agencies, and perhaps -- I don't know -- perhaps also to residency programs. I don't know how large an audience, but I'm sure I'll learn, the exam results have.

But let's consider just the report to the medical school. As I understood what you just said, all that's reported is -- well, it's pass or it's failed.

If a pass is reported for a student who -- whether it's Mr. Hartman or any other student -- who has received an accommodation of time-and-a-half or double time, is that not disclosed to the recipients of the score?

MS. LEOPOLD-LEVENTHAL: The score indicates there was an accommodation and that's it. That could mean you were hearing impaired and had a special device for your ear. It could mean a whole host of auxiliary devices, or aids, or other accommodations, but there's no description, so...

THE COURT: All right. I assume that if there were inquiries by the recipient of that report, as to what the nature of the accommodation was, there would be a response? That information would be disclosed? Or is that something we'll hear about?

MS. LEOPOLD-LEVENTHAL: I think that's probably something we'll maybe hear about. I'm not sure I know the answer to that.

THE COURT: I see. Well, this has been a very helpful conversation so far, but as I say, it already persuades me that I need to hear some witnesses that you've brought.

MS. LEOPOLD-LEVENTHAL: Thank you for hearing me out, your Honor.

Before I call my first witness, Dr. Katsufrakis, I did refer to a few exhibits during my cross-examinations of Mr. Hartman and Dr. Tetnowski that I would like to move into evidence at this time.

Tab 20 in Defendant's Exhibit Binder will be D-1. And if you'd like me to describe the exhibits, I can, or

simply give you the numbers.

THE COURT: I think it would enough to have the numbers.

MS. LEOPOLD-LEVENTHAL: Tab 21 --

THE COURT: I'm assuming that Mr. Weiner's in a position to let me know as we go along if there's anything that's trouble.

Tab 21?

MS. LEOPOLD-LEVENTHAL: That would be D-2. They were some records from Stoneybrook that we had subpoenaed.

Tab 23 would be D-23 and Tab 28 is D-4.

THE COURT: Good.

(Defendant's Exhibit Nos. 1, 2, 3 and 4 were admitted.)

MS. LEOPOLD-LEVENTHAL: Great.

Dr. Katsufrakis.

THE COURT: The record will show that I'm denying the defendant's motion for a judgment at this time.

Sir, how do you do?

DR. KATSUFRAKIS: Well.

PETER J. KATSUFRAKIS, M.D., after having been first duly sworn as a witness, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. LEOPOLD-LEVENTHAL:

Q Good morning, Dr. Katsufrakis.
A Good morning.
Q For whom do you work at the present time?
A The National Board of Medical Examiners.
Q Would you please describe what the National Board of Medical Examiners does?
A The National -- may I use NBME?
Q Sure.
A The NBME administers and scores and tracks the reports of examinees in the health professions, primarily having to do with licensing and certification exams.
Q Now, does the NBME, as far as you know, have any sort of mission statement?
A Yes, it does.
Q And are you able to describe that mission statement for the Court?
A I can't quote it, but to paraphrase, it is to protect the health and safety of the public through state of the art assessment of health professionals.
Q Would you just briefly describe your educational background for the Court?
A Sure. I received my Bachelorate Degree from the University of California at Berkeley. Then went to medical school at the University of California at San Diego. Did my family medicine training at Santa Monica Hospital, now a UCLA

affiliate. And then received a Master's in Business Administration from the University of South California.

Q Are you presently licensed as a medical doctor?

A Yes.

Q What is your current position with the NBME?

A I am the Vice President for Assessment Programs.

Q And for how long have you held that position?

A Just about a year.

Q What does the Assessment Programs Group at the NBME do?

A It's a complicated answer. The NBME is a matrix organization, so we have assessment programs, kind of on one axis, and professional services on the other.

Assessment programs are the different examinations, really. I think that's probably the best way to think about it. Although a given client may have more than one examination. But you've kind of got examination programs that are running in one direction and the professional services consists of the various different staff and professional activities to support an examination. So you've got the registration process, the administration, scoring, research, et cetera.

Q What are your current job duties and responsibilities as the vice president of the Assessment Programs Group?

A The two things I'm most actively involved in are a new program we've developed, the assessment of professional

behaviors, and that's primarily targeted to residents and will be moving to medical students within the next couple years probably.

And then the comprehensive review of the USMLE, which is a process we've initiated, a multi-year process, to retool the medical licensing examination.

Q Have you provided me with a current curriculum vitae in the context of this litigation?

A Yes, I have.

Q Would you please take a look at Exhibit 25 in the binder to the left that has a white page on top of it?

A (Witness complies.)

Okay.

Q Is this a true and correct copy of your current CV, Dr. Katsufrakis?

A I suspect it is, although it's -- it's not completely up to date. I notice that the first page has different headers and footers, as you can do in word documents, so it shows a review date of December 2008, but I think the second and subsequent pages are actually correct, which showed reviewed 2009, so I missed that when I gave it to you. Sorry.

And then I also know there should be a couple of other committee appointments that I'm sure are not reflected here, because they've just occurred within the past month.

MS. LEOPOLD-LEVENTHAL: I'd like to mark Dr.

Katsufrakis's curriculum vitae as Exhibit D-5, and it is Tab 25 in the exhibit binder, and also move that into evidence at this time.

THE COURT: All right. Good.

(Defendant's Exhibit No. 5 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q Would you briefly describe for the Court the professional positions that you've held prior to jointing the NBME. And before I ask you that, when did you join the NBME?

A June 2007.

Q Okay. And if you would describe those positions you held prior to that time?

A Okay. So working in reverse chronological order, immediately prior to coming to the NBME, I was on the faculty of the Kicks School of Medicine (ph) at the University of Southern California. I was in the Department of Family Medicine there as faculty. My primary role there was an administrative one.

I was the associate dean for student affairs. I was also the chief financial officer for educational affairs. I held both of those positions simultaneously. Had been a student affairs dean for about 14 years and education CFO for I think about seven or eight years.

I was also -- excuse me -- the CFO for the school for a year. Prior to that, I was on the faculty, and my

primary role was as director of clinical training for the Pacific Aides Education and Training Center.

Again, I will -- thank you. It's the Sudafed I took this morning.

(Pause.)

Prior to that I was the director of clinical training for the Pacific AETC. That was a program to train doctors and other health professionals to take care of people with HIV, instituted in the late '80s, when the epidemic was real prevalent, but nobody who was in practice had learned how to take care of people with HIV. So it was sort of a new Government-funded program.

And prior to that, I was in residency.

Q What were your responsibilities as the associate dean for student affairs at UFC?

A What I would -- what I tell the lay-public is that sort of like the principal of the medical school, in that from the perspective of the students, I'm -- I'm by and large the voice of the institution and the authority in the primary interface between the -- the institution and the school.

I had responsibility for tracking the performance of students throughout their four years. I was the chair of the student performance committees that tracked that.

I also counseled individual students. I had drop-in hours every week in addition to scheduling appointments for

students.

Does that answer your question or --

Q That's a good description.

A Okay.

Q What is the United States Medical Licensing Examination, also known as the USMLE?

A That is the -- a joint program of NBME and the Federation of State Medical Boards. That was developed to replace previous separate examinations to create a single common pathway to licensure for the practice of medicine in the United States.

Q What are the goals and the purposes of that licensing examination, if you can describe that, please?

A Primarily the goal was to determine the competence of individual examinees to practice medicine. It's not the sole component. State Medical Boards have different requirements. But it's probably one of the most significant ones.

It has other uses, not as -- not part of its intended use -- but medical schools will use the performance on USMLE to track individual students. Some schools have requirements about individual student's performance. They would also track student performance in the aggregate. Residency programs use scores in making decisions about whether to interview and how to rank their applicants, and there are probably other uses that I'm forgetting right now.

Q What information is provided to authorities based upon how an application performs on any one or all of the components of the USMLE exam?
A So, for example, if the State Medical Board asks us, or an examinee asks us to send information to the State Medical Board, what do we send?
Q What are you saying when you're sending that information? What --
A Well, we say whether they passed or failed. For some of our examinations, we give a numerical score. For the Step 2 CS it's simply a pass/fail.
Q And who relies upon the scores from the USMLE?
A As I mentioned previously, the State Medical Boards are the -- they're really the primary audience for these -- for these scores, and they use them as a key part. Every -- every licensing authority uses them as a key part in their decision.
Q What is the NBME/USMLE's obligation to the State Licensing Medical Boards in providing that information, if you understand that question?
A Well, I'll give it a shot, and tell me if I missed it.
Q Our obligation is to do what we had said we would do with the licensing examination. So to administer it in accordance with the policies that we've developed and to develop the content in a way that conforms with what we've published as

being our content outline, and score it the way we said we would, and just do what we said we'd do.

Q I had intended to call Dr. Farmer as my first witness, but you're the lucky one, so I'm going to ask you, if you would, to describe for the Court really what the various steps are to USMLE?

A Sure. There are three steps, three main steps, Step 1, Step 2, and Step 3.

Step 2 actually has two parts. Step 2 CK, which stands for clinical knowledge. And Step 2 CS, which is stands for clinical skills.

Step 1 is a -- I think it's about a seven-hour examination. Step 2 CK, I think is about an eight-hour examination. CS is -- I think it's probably roughly half a day. I'm not sure exactly how many hours. And Step 3 is a two-day examination.

With the exception of Step 2 CS, the examinations are administered as computer-based examinations

Step 1, Step 2, and a part of Step 3 consists of multiple choice questions, and then there's another part of Step 3, which is a clinical case simulation where we sort of simulate, rather than -- than providing options for the examinee to choose -- we simulate a clinical encounter, so we'll present a patient scenario and then require the examinee to use free text entry to identify the actions that

they want to take.

THE COURT: They're required to do what?

THE WITNESS: For the -- for part of Step 3, rather than having a multiple choice question where they would check the best one of five, we would present a clinical scenario, so a paragraph description. And then the examinee types in free form text about, Order CBC, or order chest X-ray, or something like that.

BY MS. LEOPOLD-LEVENTHAL:

Q What is the NBME and the USLME trying to examine in administering Step 2 CS?

A Step 2 CS is designed really to simulate the clinical encounter between a physician and a patient. So we strive to measure the ability of the examinee to do everything that's needed for that encounter.

Q When was the Step 2 clinical skills test first introduced?

A It was first introduced as a required part of the examination in 2004.

Q And why did the NBME develop and introduce the Step 2 CS exam in 2004?

A When I answer the question, for me it harkens to what I'm doing right now. I mentioned that we were retooling the USMLE examination.

Over the course of time, we -- medical education

changes. Medical practice changes somewhat, but not so much. And technology and particularly assessment technology change. So what we try to do with the examination is to make sure that we are measuring what we can of the examinee's performance that is material to their function as a physician.

In the late '90s, mid to late '90s, there was increasing recognition of the importance of a number of different clinical skills, particularly communication skills that we did not assess in a very robust thorough manner through the use of the multiple choice questions that we had on the examination. So the clinical skills examination was developed to assess these abilities in a more robust fashion, a more comprehensive manner.

Q What influence, if any, did patient safety and patient medical treatment have on the development and introduction of the Step 2 CS examination?

A Well, if you think about -- if you think about what happens in caring for a patient, what do we do to -- what do we as doctors do to or for patients? Mostly what I can think of, we start -- we give medications, we perform operations, we do -- but what we really start with is communication. And there is an incredible difference in the way somebody prescribes to the way I prescribe hydrochlorothiazide versus another physician prescribes hydrochlorothiazide, in terms of

whether or not the patient understands what I said, believes what I said, has doubts about me, actually -- actually will follow through with taking the medication to treat their blood pressure. So communication is just a key skill. It's at the heart of patient care, and that includes patient safety as well.

In part because of patients who don't understand, say, medication orders clearly, may use the medication incorrectly in a way that would jeopardize their health. Also, interprofessional communication. So communication from one physician to another is a key part, or lack thereof, is a key part of patient safety.

Q And you mentioned that, you know, something occurred in the late '90s and thereafter. Was there some sort of deficiency that was recognized and acknowledged that then, therefore, ultimately result in a development of the Step 2 CS examination?

A You know, I -- I believe that this was probably the issue of communication. It probably was addressed in the National Institute of Medicines Report to Err is Human. But I don't know that for a fact. But, in fact, there was a lot of -- a lot of literature published that dealt with the role of communication, and communication failures, and how those translate into having an impact on patient care. So I don't know that -- there may be one centennial report that I'm just

not thinking of.

Q With respect to the Step 2 CS examination, are there skills or competencies that a student is required to have competency in -- I hate to use the same word -- in order to pass that examination?

A Yes.

Q And what are those? Is competencies the right word?

A Competencies is the word that's currently used in medical education, medical assessment. So the -- the -- and there are six competencies that have been named by the American Board of Medical Specialties and the Accreditation Council for Graduate Education. And they're sort of the paradigm that guide most medical education and assessment activities these days. So we're also adopting those as a framework for our retooling of the USMLE.

To use their -- to use that scheme, well, the six are medical knowledge, patient care, professionalism, interpersonal communication skills, practice-based learning and improvement, and systems based practice.

And the clinical skills examination, of those probably probes interpersonal communication skills most effectively, but also touches on patient care, and to a lesser degree medical knowledge.

THE COURT: Would you permit me to ask you to give those six again?

THE WITNESS: Certainly.

THE COURT: A little --

THE WITNESS: A little more slowly?

THE COURT: A little more slowly.

THE WITNESS: Medical knowledge.

THE COURT: It sounds like a good one.

THE WITNESS: Yes, patient care.

THE COURT: Right.

THE WITNESS: Professionalism, and actually we get professionalism a bit with the CS also.

Interpersonal and communication skills.

THE COURT: Interpersonal and communication skills?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: Practice-based learning and improvement, and systems-based practice.

THE COURT: Could I ask you one further question?

THE WITNESS: Certainly.

THE COURT: You raised systems-based practice rolls off the tongue with some difficulty, but I can get around it, but what does it mean?

THE WITNESS: The short answer is, there's a lot of discussion around that. I don't think it would be accurate to say that there is a widely accepted definition of specifically what is and is not encompassed by systems-based

practice.

Generally, I think what is intended with that competency is the belief that a physician needs to have awareness of how their work exists within the context of a larger health care system, and how decisions they make on an individual, for an individual patient touched the other parts of the health care system. And, similarly, how elements of the system can be drawn in to create the best care for a patient.

This also relates to practices where a physician would analyze her or his individual practice looking at the whole system of care that she or he provides, and try to identify areas that would need improvement.

So thinking not just on the basis of one doctor, one patient, but rather looking more globally to try to identify opportunities for improvement, and I think it's --

THE COURT: And it may -- oh, I'm sorry.

THE WITNESS: And I think it's really driven by the To Err is Human report I mentioned previously, which estimated that between -- I think it was 100 to 200,000 deaths per year were attributable to preventable accidents, that in part were due to systems failures.

THE COURT: So we have to move to robotic medicine, so there won't be human errors.

THE WITNESS: Well, you know, one of the -- medicine

has been much slower than other fields to adopt information technology.

I mean, there's a big push presently at the level of the Federal Government to adopt electronic health records. And I think when used well, for example, if you've got an electronic prescribing system that automatically identifies a serious interaction between two medications, that that's a great benefit.

I hope we get to the point where we take advantage of the best that technology can provide and not have it move us to robotic medicine.

THE COURT: Let me just ask one more question: You say there's discussion as to what is the connotation or content of systems based practice.

At least in your judgment, would both of the following elements, one of the following elements, or neither one of them fall under that heading? One, the relationship of a physician to the hospital setting and institution where he has privileges, that is, including the extent to which such a physician feels herself under direction to conform to certain kinds of practice of the profession, medical care. So, one, that kind of inquiry. How do individuals fit into the medical centers within the framework of which they work?

Second, the degree to which a pediatrician feels under an obligation to conform, practice, to generalize norms

announced by -- I don't know whether the Pediatrics Board does -- but one or another of the monitors of practice, the degree to which the individual physician feels an obligation to conform to, is pleased with the opportunity of getting information from, is in a position perhaps contribute to the formulation of more generalized canons of how to be a good pediatrician?

I'm just wondering broadly whether either of those quite separate categories is --

THE WITNESS: As you described those, the first case was a physician and the physician's relationship to a hospital and the pressures that that physician might feel with regard to managing in a particular way. And the second where you talked about a pediatrician's feelings about a directive, a national guideline, for example, and presumably their behavior in response to that.

Because you used relationship and feeling, I would probably categorize those issues more under the heading of professionalism, but I think if you talk about a pediatrician's adherence to vaccination guidelines, that would fall right in a system-based practice. So a pediatrician -- there are national guidelines for what vaccines are supposed to be given to which patients at what ages. And if would be kind of a bread and butter example of systems-based practice to look at a pediatrician's actual

practice and identify how closely they conform to those guidelines.

Similarly, with regard to hospital policies or requirements, I could imagine that there might be situations that would fall square into systems-based practice. But if you're talking about say the physician -- it's a little bit -- it's not cut and dry. That's how I would see it.

Did that answer your question?

THE COURT: That's very helpful.

THE WITNESS: Okay.

THE COURT: At least I get the idea that either of those scenarios, fields of inquiry, might fall in part or in whole under one or another of the --

THE WITNESS: Mm-hmm.

THE COURT: -- six canons.

THE WITNESS: Well, and if you imagine the scenarios playing out, you could think that communication skills would come in as well, so...

THE COURT: Right.

Ms. Leopold-Leventhal, I'm sorry to have been, as you might feel it, but not say it, wasting your time.

MS. LEOPOLD-LEVENTHAL: Not at all. I didn't feel it.

BY MS. LEOPOLD-LEVENTHAL:

Q With respect to the Step 2 CS examination, would you

agree with me that the third and fourth competencies that you described, that is professionalism and interpersonal communication skills, are those that are endeavored to be assessed on that examination?

A Yes, definitely, but also a little bit of patient care and a little bit of medical knowledge as well.

Q Thank you for correcting me.

With respect to those competencies that are endeavored to be assessed on the Step 2 CS examination, did the NBME believe that these competencies were not assessed by the USMLE prior to the adoption and introduction of the Step 2 CS exam?

A I wasn't at the NBME at that time. I would suspect that the staff would argue that say professionalism was assessed in the previous examination, as were communication skills, but in a very rudimentary limited manner, in a manner limited to what would be possible using multiple choice questions, you know, so you can ask questions about ethics, for example, and that's an element of professionalism, but it's just a small part.

Q Okay. And if you would, just provide a more expansive description of what the Step 2 CS examination is designed to simulate.

A It's designed to simulate the clinical encounter of a physician and a single patient in an outpatient setting

primarily. There are some cases that are telephone cases, so within a given form, a form is the collection of cases that an individual examinee would see, within a given form there might be one telephone case which would simply be the examinee communicating with the patient over the phone, but most of the time it's a patient in the room with the examinee in an outpatient setting for a non-emergent specific problem, so not a comprehensive physical examination, but perhaps I twisted my ankle yesterday.

Q And is the Step 2 CS examination made up of several subcomponents?

A Well, the examination is made up of 12, 15-minute interactions with a standardized patient, and a -- I think it's a ten-minute interstation exercise as well. So the -- for each case, for each of the 12 cases, the examinee would typically spend 15 minutes or less, if they don't -- if they choose or decide to leave early -- with the standardized patient, and then they would have the remaining time with the ten minutes to complete their patient note.

Q And typically what is involved in that patient encounter? I know you can't generalize, because they're different depending on how the patient presents, but what generally occurs during the SP encounter?

A I think of it in the way that I organize my notes. There's an acronym we use called SOAP, which stands for

subjective objective assessment and plan. So a subjective us the process, what does the patient tell you? Objective is what did you observe? What did you examine and find? And then what's your assessment? What do you think's going on? And the plan, what should we do?

So the examinee is expected, based upon the limited presenting complaint, to ask appropriate questions, to perform the appropriate examinations, and then explain to the patient what -- what the examinee thinks is happening and where we go from here.

Q And then I think you indicated there's a ten-minute block of time, and what occurs during that block of time after the patient encounter is completed?

A During that time, the examinee creates their progress notes, so -- their patient note -- so they summarize their findings and they're thinking about what the patient's going through.

Q Now, I understand that ultimately a test-taker receives either a pass or a fail, correct?

A Correct.

Q But is the examination broken up, just for grading purposes, into subcomponents?

A Yes, there are three noncompensatory elements to Step 2 CS scoring. And when I say "noncompensatory," that means you have to pass all three. Doing really well on one and poorly

on another wouldn't suffice.

The three elements are the integrated clinical encounter or ICE, I-C-E. The CIS, C-I-S, which is communication and interpersonal skills. And SEP, S-E-P, the spoken English proficiency.

Q With respect --

A Should I repeat those, Judge, or?

THE COURT: I think I've got them, but tell me again.

THE WITNESS: ICE is integrated clinical encounter, CIS, C-I-S is communication and interpersonal skills, and SEP is spoken English proficiency.

BY MS. LEOPOLD-LEVENTHAL:

Q What does the ICE subcomponent assess?

A That assesses the individual's history and physical exam skills, and it's -- it's dependent upon the standardized patient's rating of their performance on both of those, as well as the patient note, the -- their written findings that follow after the examination.

Q Does that -- if I were to say to you, How is it graded? Was that included in your answer or is that a different answer? How that subcomponent is graded?

A No, I'm -- well, I don't think it was included.

What I would say is that for a given case, there are particular elements of the history that we have determined

are essential. And so an examinee is judged upon how many of those critical elements they're able to elicit from the patient.

So using the example of a twisted ankle, they should ask about the mechanism of injury, they should ask about the degree of pain, they should ask about anything used to assist the pain, what their response was, et cetera.

Physical examination similarly, the standardized patients are taught how examinees are supposed to do a physical examination correctly for the affected parts of the body that are -- that are indicated by the particular chief complaint. And then the standardized patients will grade the examinees as to whether or not they performed those maneuvers appropriately.

And in the other part, the patient note, is graded by a trained note rater who is a physician who has been trained how to grade that particular case.

THE COURT: May I inquire?

MS. LEOPOLD-LEVENTHAL: Please.

THE COURT: Maybe perhaps you were just about to get to it. I just wanted to get a sense of what the quote, "grading process" is, and where it -- at least in some -- in some phases results in a number or, and in others adequate, high proficient, or those kinds of labels or what?

THE WITNESS: I don't know the answer to that. I

don't know. I would guess that, for example, with the history and the physical examination, where there's a checklist of things that we've identified, I suspect that -- just by counting, you know, counting issues, there would be a number that would be generated.

And I don't know if our scoring considers a difference between a 7 and a 9, or if we simply establish a threshold for a particular case, and a particular checklist.

THE COURT: All right. Maybe I can put it this way.

You're the would-be physician, and I'm the patient, and we have 15 minutes of interaction. Do I then write down a number or do I --

THE WITNESS: No, you indicate -- there's a scoring rubric, so you have to go through the history, the physical examination, identify -- I don't know if you have to identify how many of the history items I asked, or whether you simply indicate a number. I don't know the answer to that.

THE COURT: Okay.

THE WITNESS: But you would do that for each of the subcomponents.

THE COURT: I see.

THE WITNESS: So, for example, with regard to the CIS scale, there are three subscales, so the CIS is a subcomponent of Step 2 CS, and then as part of CIS, there are further subscales, and you need to -- you would provide a

numerical score for each of those.

THE COURT: I see.

Now, am I right that Steps 1 and 3 are both multiple choice?

THE WITNESS: Step 1, Step 2 CK, and most of Step 3 are multiple choice, but Step 3 also has that free text entry part. The CCS, the computer case simulation.

MS. LEOPOLD-LEVENTHAL: And, your Honor, our third witness is Dr. Clauser, who is psycho-matrition, who will hopefully be able to answer all of our questions with respect to the subtleties in the grading process.

THE WITNESS: Undoubtedly.

THE COURT: Mr. Vice President, I'm sorry that I've --

THE WITNESS: You've exposed my ignorance.

THE COURT: -- gone and -- I expect there's a lot of responsibility.

BY MS. LEOPOLD-LEVENTHAL:

Q With respect to the second subcomponent of CIS, would you describe what that assesses?

A That looks at information gathering, so the ability of the examinee to obtain information from the standardized patient. Information sharing, which is what its name sounds like. And then a physician manner and rapport. So the professionalism of the examinee.

Q And how is the CIS subcomponent graded?
A Each of those categories -- those three categories I just described, information, gathering information, sharing, and PMR, have a separate scale that the standardized patient rates, and, yes, I think it's a numerical scale.
Q Now, with respect to the third subcomponent, the spoken English proficiency or SEP --
A Well, that's -- okay. So that's -- so we're not talking about CIS now. We're talking about SEP?
Q Yes.
A Okay.
Q What does the -- did I cut you off with respect to CIS?
A No, no.
Q Okay.
A I just wanted to make sure that -- that we were distinguishing between CIS, which has those three elements, and SEP, which is -- is it clear? I mean, I just -- it's sort of a hierarchy. There's CIS, SEP, ICE, and then CIS has these subcomponents.

And you were asking me about SEP, sorry about that.

Q No, it's okay. It's confusing.

And with respect to SEP, the spoken English proficiency subcomponent, what does that C2 assess?
A Spoken English proficiency.
Q Can you explain what that means, please?

A It assesses the examinee's ability to speak English in a way that is intelligible to the standardized patient. So it looks at word choice. For example -- well, I don't know if -- we score down for jargon. If I use medical terms, as an examinee, then that's problematic, but I'm not sure that that's captured under SEP. I think that's actually captured as part of the CIS scale.

So SEP would be more focused just on do you communicate in a way that the patient can understand? Is your speech too rapid or too slow? Is the volume appropriate? Do you choose the right words?

Is that answering your question?

Q It is. How is that subcomponent graded?

A Pass/fail.

Q And does listener effort impact or effect the assessment and grading of the SEP component?

A Yeah, it does.

Q Okay.

A That's something that's contained -- in our description of the examination, in our bulletin of information, we identify listener effort as being one of the -- one of the determinants of the SEP score. And, in fact, that's -- that's something that the standardized patients are trained to judge. They're taught to listen carefully to the examinee and also pay attention to the amount of effort required to

understand the examinee.
Q There's been a suggestion in this litigation that the SEP component is designed to weed out non-English speaking test-takers only. Do you agree with that?
A No.
Q Why not?
A I would first acknowledge that the ability of a non-native English speaker is important, and many international graduates who fail the CS examination, fail ont he basis of SEP. But SEP is designed, as the spoken English proficiency, of all of the examinees. We don't -- we don't have a different examination for international graduates versus U.S. grads. It's the same examination for everybody.
Q If you would take a look at Tab 7 in the other binder, the one that doesn't have a white page, that's plaintiff's binder. It's Tab 7, but it is Exhibit P-10.
A Exhibit which?
Q P -- it's Tab 7 for you.
A Oh, okay.
(Witness complies.)
This is a letter to Dr. Farmer from Aaron Hartman?
Q Correct, we're all on the same page.
A Okay.
Q If you would, take a moment to familiarize --
A Okay.

Q -- yourself with that letter. I'd like to ask you about essentially the last sentence.

A Okay. Just a moment.

(Pause.)

THE COURT: I'm sorry. Are we talking about Mr. Weiner's letter to --

MS. LEOPOLD-LEVENTHAL: No. It's in the plaintiff's binder, Tab 7.

THE COURT: Oh, Tab 7.

MS. LEOPOLD-LEVENTHAL: Tab 7. It's confusing, but it's P-10, but Tab 7.

THE COURT: I see.

MS. LEOPOLD-LEVENTHAL: Sorry about that.

(Pause.)

THE COURT: My misunderstanding is not a measure of your lack of proficiency in speaking English, it's a measure of my lack of understanding.

THE WITNESS: Okay. I've finished.

BY MS. LEOPOLD-LEVENTHAL:

Q And I'm directing your attention to the last sentence which is five lines up and it begins, "Also" -- it's written to Dr. Farmer -- "You indicated that the fact that I passed the SEP subcomponent on the prior exam is evidence against my request, but the SEP accesses clarity of spoken English (pronunciation, word choice, and minimizing the need to

repeat questions or statements) and I do not have a problem with clarity, so I would not expect to fail this subcomponent."

Are you with me, Doctor?

A Yup.

Q Is Mr. Hartman correct with respect to what he is summarizing the SEP component --

A Well, he's --

Q -- assesses?

A -- he's correct in that it assesses clarity of spoken English. It does assess pronunciation, word choice, and minimizing the need to repeat questions or statements. But his assumption that since I don't have a problem with clarity, I would not expect to fail this subcomponent, I mean, that's his expectation, but it's certainly possible that he could have failed on the basis of listener effort, as we've described previously. That's identified as one of the characteristics that we measure with SEP and he hasn't mentioned that here. So I think that's kind of a flaw in his reasoning.

Q Must a take-taker pass all three of the subcomponents in a single administration to achieve a passing score on the Step 2 CS exam?

A Yes.

Q And you understand that Mr. Hartman passed the ICE and

the SEP components, but not the CIS?

A Yes.

Q Is it possible that Mr. Hartman failed the CIS component for reasons other than his speech dysfluency?

MR. WEINER: Objection.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MS. LEOPOLD-LEVENTHAL:

Q Okay. What other reasons, other than speech dysfluency, could have contributed to or caused the failing grade on this subcomponent?

A For CIS?

Q Yes, sir.

A Well, as I mentioned previously, the CIS component is made up of three different subscales; information gathering, information sharing, and physician manner and rapport, and on the basis of any of those, he could have failed it.

So he could have failed to ask the appropriate questions to elicit the information that's needed from one or more of the standardized patients. He could have failed to provide the necessary information in terms of information about a recommended treatment, or patient education, or the other things that are required as part of information sharing. Or he could have had a poor -- a poor manner and failed at establishing good rapport with the patient. So any

or all of those.
Q Is it possible that some aspect of Mr. Hartman's physical examination or diagnostic examination of the patient could have contributed to and/or caused failure on the CIS subcomponent?
A His performance of the physical examination would typically be captured by the ICE subscale. So the integrated clinical encounter.
Now, when performing physical examination, you can do so in a manner that is respectful, and sensitive, and caring of the patient, or you can do so in brusk manner that hurts the patient. And, so, performing the physical examination could have impacted the professional manner and rapport scale.
Q And that's captured in the CIS subcomponent, correct?
A Yup.
Q You testified earlier that a number of different groups rely upon the USMLE results. Did you say the state medical licensing boards rely upon these results?
A Oh, definitely.
Q And how do they rely upon them or what do they use them for?
A As I mentioned previously, they used to be different pathways, and the Federation of State Medical Boards and the NBME created the USMLE to provide states with one standard by

which they could judge applicants for licenses to practice medicine. So it's really just -- it's probably the most important part of the application.

Q Are you familiar with the phrase "assistive devices"?

A Yes.

Q What does that mean in the context of this examination?

A My understanding is that these are -- is that these are devices that an examinee might use to help them overcome a disability.

Q Okay. Before we leave the various subcomponents, and move to another topic, I would ask you to turn to Exhibit 37 in the defendant's binder, which is the one with the white cover.

(Pause.)

Actually, 36. It's the second to the last one, and it is Dr. Tetnowski's deposition transcript. So that's defendant's binder, Exhibit 36.

A Okay.

(Witness complies.)

Q And if you would turn to Page 76.

A Now, when you say "76," do you -- oh, okay, the little ones.

Q These are minuscripts.

A The four to a page.

Q Right, they are four to a page.

A Okay. So the page that starts, "Time to gather the information"?

Q Yes.

Directing your attention to Line 22 at the bottom of Page 76, I was questioning Dr. Tetnowski at his deposition, and I asked:

"Are there any skills that are tested on the CIS component effected by Mr. Hartman's impairment? Any skills that are tested? That's what I'm looking for.

"Answer: Skills?

"Question: Yes.

"Answer: No, to the best that I understand the exam."

Are you with me, sir?

A Mm-hmm.

Q Is Dr. Tetnowski correct with respect to his answer to my question that Mr. Hartman's impairment would not effect any skills tested on the CIS subcomponent?

A No, he's not correct.

Q Why is that?

A Well, for the reasons we've talked about. We assess spoken English proficiency, we assess communication and interpersonal skills. I would think that, as I understand Mr. Hartman's impairment, both of those could potentially be impacted by his disability.

Q With respect to the text to speech device, are you familiar in some respects with the device that Mr. Hartman is suggesting he be permitted to use on the Step 2 CS exam?
A I've not had personal experience, but I'm conceptually familiar, and I've used other computer text to speech simulations, yes.
Q Doctor, what impact, if any, would the use of a text to speech device have on the NBME's ability to assess the SEP subcomponent?
A There would be no spoken English, so there would be no ability to assess spoken English proficiency.
Q Let's say, for example, the text to speech device was used intermittently throughout a particular patient encounter or throughout all of the patient encounters.

What impact would the intermittent use of the text to speech device have, if any, on the NBME's ability to assess the SEP subcomponent?
A Well, just talking about SEP -- let me back up a bit.

With any examination, what we are doing is, we're asking an examinee to perform particular tasks in the belief that their performance on that examination is representative of their performance on some real world activity of interest.

For the clinical skills examination, our constructive interest is the ability to interact effectively with patients. Every examination is constructed with a

number of assumptions made about the kinds of activities that are included in the examination, the number of times those exams -- those activities are assessed, how they're assessed, et cetera.

And that whole, the whole of all of those assumptions and activities, go into the score for the assessment. So if you pull out some parts of that, if you limit the sample of spoken English proficiency, you materially alter the conditions that underly -- the assumptions that underly the examination.

You're -- you're -- it's like saying if you've got a multiple choice question examination that has 100 questions on it, and you only test 50 of those, is that the same as 100? Just 50 or whatever the performance is multiplied by 2.

And the answer is, No, it's not.

Q Would the NBME be able to assess Mr. Hartman's spoken English proficiency if he were to walk into each encounter, say a sentence, and then refer to his text to speech device to communicate through --

A No, that wouldn't even -- that wouldn't be enough.

Q What would be enough?

A The whole encounter would be enough.

Would there be a threshold below that which would be enoughish, close? I don't -- I honestly don't know the answer to that. But what I do know is that if it were less

than the entire encounter, then that changes the fundamental assumptions that underly the way the examination was structured.

Q If the test were administered that way, where Mr. Hartman would be permitted to utilize the text to speech device intermittently, as he chose to, is it fair to say that he would be evaluated differently, assessed differently than every other test-taker who's ever taken this examination?

A Without doubt. It would be -- let's use a different example. Let's say he used his speech 100 percent of the time for eight of the encounters, but didn't for the other four.

Well, that's a different examination. We can't score -- we can't give a SEP score on the basis of eight cases. That's not the way the examination was developed. That changes the exam. It would be an inadequate sample.

Q Are eye contact and rapport elements that are assessed in the Step 2 CS examination?

A Yes.

Q Which subcomponent do they fall under?

A CIS.

Q Why are they important, important enough to be included as one of the values that's assessed?

A You used eye contact and rapport, and you grouped them together. I'm going to separate them out. And, in fact, I

would -- I would increase eye contact and I would just talk about non-verbal communication generally.

So eye contact, facial expression, gestures with your hands, all of these are ways in which we communicate, as humans we communicate. And they're critically important in the examination with a patient. My ability to watch a patient, to examine their -- to look at their faces as I'm performing my examination, to watch their reaction to my words, helps me gauge the understanding, their understanding and whether anything I'm saying is troubling to them.

I can also -- and I can also assess whether or not they're engaged in listening to me, so I can slow down, I can back up in response to what I perceive to be as unspoken questions that they're raising. So in that way, nonverbal communication is critical.

It gets back -- previously to what I said about patient safety -- it gets back to patient safety, among other things, as well as patient satisfaction, and their -- the overall quality of the interaction.

Rapport. Rapport is important because it feeds into a patient's likelihood of complying with whatever recommendations I've made. When -- it's astounding to junior medical students to think that it's not enough simply to know the right answer, but you have to convince the patient that your knowledge is worth changing their life, having them do

something, or stop doing something, that's critically important to them.

And my ability to get you to stop smoking, if you were to smoke, would be very much dependent upon the rapport that I establish with you, the credibility, the trust that you placed in me.

Q Do you believe that intermittent use of the text to speech device would or could have an impact on the rapport between the patient and the doctor, and if so, how?

MR. WEINER: Objection, foundation.

THE COURT: I'm sorry. What was the objection?

MR. WEINER: Foundation. How would he know, if he's never seen text to speech used at a patient encounter?

MS. LEOPOLD-LEVENTHAL: Well, I don't think he --

THE COURT: Let him make whatever observations he thinks he's in a position to make and --

BY MS. LEOPOLD-LEVENTHAL:

Q Well, before you answer, how do you understand the text to speech device working?

A My understanding is that an individual could type on a keyboard into a computer, which has a speaker attached to it, and the software program would generate those words in an audible fashion.

Q Based upon that understanding, Doctor, would or could use of the text to speech device impact or effect the rapport

between a doctor and a patient?

A Almost undoubtedly.

Q Why is that?

A I can think of a number of reasons. One would be the rhythm of the encounter. So my -- where I pause, and the amount of time that I take to respond to something, communicates to the patient -- whether I intend that or not. So when I pause right now... that's different than when I just continue speaking fluently without pausing.

So there is -- now, for good or for bad -- there is -- it's part of a human communication. We will make assumptions about what that pause means. So if I'm typing on a keyboard, I'm also communicating to the patient that I'm not as engaged with them. I don't have the eye contact that I would if we were having a direct conversation.

So, you know, think about I'm going to tell you that you have cancer, and that's -- that's an overwhelming bit of information for a patient. I want to be able to -- I want to be able to manage that communication in a way that allows me to be fully engaged with the patient 100 percent of the time. And a device, a text to speech device, would inevitably change that dynamic.

There are other examples, too, but if I've not answered your question, I --

Q No, you have.

With respect to the physical examination part of the Step 2 CS exam, would use of the text to speech device impact that in your opinion?

A It would for me. The way we teach students to perform an examination, and the way I try to do that, is that we teach -- we teach students to communicate what they're doing to the patient as they're doing it.

So, for example, when I look in a patient's eye, I explain to them that I'm looking at the blood vessels in the back of their eye, that this is an opportunity for me to see not just how the eye works, but also to look for signs of hypertension or diabetes or some other systemic illnesses that arise. So there's an educational aspect to the physical examination, and patients are generally interested and want to know what you're doing.

There's also a more mechanical and practical aspect of the physical examination, in that you need to give instructions to the patient. Imagine me examining the leg. So I want to tell you to extend the knee, to hold it in place, don't let me push it down, pull it down, don't let me straighten it, I'm going to move it to the side, tell me -- I'll end there.

Q And explain how you would envision the use of the text to speech device as effecting that type of physical examination then?

A Typically what we find with patients, what we teach medical students is that you should give one direction at a time. So it's -- you might imagine that you could say to the patient, Okay, what I want you to do, over the course of the next couple minutes, is first straighten your leg and hold it straight, then bend the knee and keep it bent, then, you know, et cetera.

In fact, you can't do that, because people remember the last thing you told them, but they don't remember everything else. So what would have to happen I think by using a text to speech device is that the examiner would need to enter the -- enter the instruction, and then allow the patient to respond, and then enter the next instruction, and so on. And if the patient has questions, and then you have to respond to those, too.

Q And would that just be for the examination of a knee or other parts of the body as well?

A No, the other parts of the body as well. Open your mouth, breathe in and out, take deep breaths, no, with your mouth open, because people don't listen when you tell them what to do sometimes.

Q Now, let's say, for example, a test-taker were using a stethoscope.

A Mm-hmm.

Q And providing instructions to the standardized patient,

and that test-taker were using in part the text to speech device.

How would you envision that impacting that particular physical encounter?

A It depends on what you're listening to. So most people think of using the stethoscope to listen to the heart. When you listen to the heart, and for just listening to the heart, I think what you could say using the text to speech device -- say -- tell the patient up front, All right. I'm going to listen to your heart right. I just need you to lie quietly until I finish listening to your heart. And that would be fine.

We also use the heart -- the stethoscope to listen to the lungs, and that was the example I gave previously about, Take deep breaths in and out, hold it, okay, open your mouth. And then there are other times we listen to other parts of the body with a stethoscope to the abdomen and to the neck.

In listening to the carotid arteries to hear if there's any abnormal sounds, you would need to tell the patient not to breathe while you're doing that. So you would issue the command in advance, something probably like, I'm going to listen to your neck. When I place the stethoscope on your skin, please stop breathing until I remove it. That's how I would imagine it being used.

Q And in doing that, and varying the use of the stethoscope, how would the text to speech device work in that setting?
A Well, I'm assuming you'd have to go back and forth between the exam table and the -- I'm assuming the keyboard would be somewhere nearby, and just go back and forth between the patient and the keyboard.
Q And how, if at all, would that be impacted if, for example, the physician had some sort of medical equipment in his or her hands that they were utilizing?
A Like a stethoscope, for example?
Q Yes.
A It's just -- it's another piece of equipment to have to manage. I don't think you could use a keyboard and a stethoscope simultaneously.
Q Are there --
A I couldn't.
Q -- are there any other pieces of medical equipment or items that you don't believe a doctor would be able to use simultaneously with the text to speech device?
A My guess would be that most everything, because, I mean, typically with a keyboard, you're using two hands. I have not seen somebody who can type very effectively with just one hand. So any -- and every medical -- every piece of medical equipment that we use in the exam room uses at least one

hand, so the otoscope to look in the ears, the ophthalmoscope to look in the eyes, the reflex hammer, you know.

Q So, for example, if you were using the otoscope then, and looking in a patient's ear, if it was a two-handed type where they would have to put that instrument down, type some instructions --

A Correct.

Q -- pick it up again, back and forth --

A Right.

Q -- like that?

A Exactly.

Q Okay. Are you familiar with the phrase "fundamental alteration," Doctor?

A Yes.

Q Would use of the text to speech device fundamentally alter the assessment of the skills that the SEP subcomponent is designed to assess in the viewpoint of the NBME? So I'm not asking for your personal opinion. I'm asking you about the NBME's view on that.

A Yes.

Q Why is that?

A It gets to the point that you were asking me about previously, if somebody were to use a text to speech device, could we assess their spoken English proficiency? And if they're using that 100 percent of the time, there is no

spoken English, so there's no ability to assess that.

And, again, harkening back to the comments I made previously about the sample size, you know, what if it we're -- we're trying to represent with our examination a prediction of an ability -- of an individual's ability to perform these tasks in the real world? And if we reduced the size of the sample, we have fundamentally altered the examination.

THE COURT: It's ten past 1:00. My thought would be for us to recess for lunch at 1:15, if that's an approximately convenient place for you to pause, but if -- if needs another few minutes, that's all right, too. But then we will recess for an hour at 1:15 or at 1:20.

MS. LEOPOLD-LEVENTHAL: That's fine, your Honor.

Dr. Katsufrakis has to be on an airplane this evening and the flight is at 5:50; is that correct?

THE WITNESS: Correct. If we could -- I mean, what I'd like to do is, if I could leave here by 4:30, so that I can get a half hour to the airport, and then give me a chance to get through security.

MS. LEOPOLD-LEVENTHAL: We will do our best. I just wanted your Honor to know he --

THE WITNESS: I have a funeral to go to in California, so...

THE COURT: Well --

MS. LEOPOLD-LEVENTHAL: But this is a fine place to break, and I'm not suggesting I can finish his direct examination in 20 minutes, so if you would like a break, then this is a good time.

THE COURT: All right. You have one other witness, do you, Dr. Farmer --

MS. LEOPOLD-LEVENTHAL: Two other witnesses and a Dr. Clauser who's the psycho-matrition who's going to explain the impact on the grading process with the text to speech device, and a few other issues, but he will be very short, as far as witnesses go.

THE COURT: Well, it doesn't sound as if you anticipate completing your case this afternoon.

MS. LEOPOLD-LEVENTHAL: Maybe if we went to midnight. Probably not this afternoon, no.

THE COURT: Because I'm not going to be here tomorrow.

Well, we'll have to deal with that.

All right. We'll resume then at -- let's see -- it's 1:15. We'll resume at 2:15.

MS. LEOPOLD-LEVENTHAL: Are we in a different courtroom?

THE COURT: Yes, we're in a different courtroom. It's Courtroom 12A, which is just four floors down from here. You'll probably see Judge Rufe's name. It's essentially the

same.

So if we can see you back here at 2:15?

THE WITNESS: Of course.

THE COURT: Very good.

MS. LEOPOLD-LEVENTHAL: Thank you, your Honor.

THE COURT: We'll undertake to get you out of here today --

THE WITNESS: Thank you.

THE COURT: -- to get your plane.

(A luncheon recess was held from 1:14 o'clock until 2:24 o'clock p.m.)

THE COURT: Welcome to a different courtroom with different portraits on the wall, but as usual we have a gallery of bad portraits of ancient white males.

(Laughter.)

Of course I don't know who those people are back there, but if you want to find out, Ms. Bozzelli will tell you, because she's in charge of everything in the courthouse; is that right?

MS. BOZZELLI: No.

THE COURT: We're getting into considerable difficulties about timing, and I just have too many commitments. I had really thought we were going to finish this afternoon, and I can't meet with you tomorrow.

How close to finishing do you expect to be by 6:00

o'clock?

MS. LEOPOLD-LEVENTHAL: 6:00 o'clock this evening?

THE COURT: Yes.

MS. LEOPOLD-LEVENTHAL: We'll be into our second witness, and I don't anticipate more than an hour-and-a-half of direct for her. I can't predict the cross. And my third witness is very short.

THE COURT: I see. So you're thinking that by the end of this afternoon we'll need, what, two hours to wind up, between the --

MS. LEOPOLD-LEVENTHAL: I think three hours to be safe.

THE COURT: Two or three hours.

Well, suppose we get started Monday at 8:30? And I'm really going to push both counsel to be succinct. I'm going to get in trouble with Ms. Bozzelli if I allow much more court time. She keeps telling me of the other matters that we have to address.

And she's right, so --

MR. WEINER: Your Honor, could we have a courtroom designation for Monday?

MS. BOZZELLI: Someone is working on that right now and I should know in the next hour or so.

MR. WEINER: Okay.

MS. BOZZELLI: And I can always contact you tomorrow

if I don't know.

MR. WEINER: That's fine.

THE COURT: But I think it's going to be the one on the 17th floor.

MS. LEOPOLD-LEVENTHAL: And are we --

MR. WEINER: I'll tour the courtrooms.

MS. LEOPOLD-LEVENTHAL: -- are we going until 6:00 this evening? I just want to make sure. I'm going to call another witness and make sure she's here.

THE COURT: Tonight we're going to go until 6:00 o'clock.

MS. LEOPOLD-LEVENTHAL: Okay.

THE COURT: All right. I guess we're going to bring you back, sir, for more examination.

PETER KATSUFRAKIS, resumes the stand.

THE COURT: I'm getting to see courtrooms that I haven't -- not merely sat in them before, but haven't held before, so that's a result of our dispersion.

All right.

BY MS. LEOPOLD-LEVENTHAL:

Q In a bit of a wrap-up of the examination, Doctor, I'm asking you to consider the CIS subcomponent, which you described earlier this morning.

What impact would use of an assistive device, such as text to speech, have on measuring the CIS subcomponent?

And when I ask you to that question, I'm asking with respect to use of the device either intermittently, or throughout the entire examination.

A For the CIS scale, so, again, that has the three components; information gathering, information sharing, and physician manner and rapport, it would permit information transmission, so information gathering and information sharing while slower should still be able to proceed, assuming there were sufficient time. If additional time were not granted, then it would probably impact the examinee's ability to accomplish all the tasks needed within the 15-minute slot.

For the physician manner and rapport, it would dramatically, substantially alter the interaction between the examinee and the patient. So you would have -- the richness of the nonverbal communication that I described previously would be fundamentally altered.

I feel certain that the rapport would be substantially diminished. It would change the character -- it would also, I think, effect the examinee's ability to read the patient, and to gather the nonverbal cues that the patient was providing.

Q Are you also aware that Mr. Hartman had requested to use an orator on the Step 2 examination?

A Yes.

Q And do you know how he proposed to use the orator?
A No, I don't.
Q Okay. I'll tell you, he had requested to type words and have the orator speak the words that he had typed.

Given that assumption, do you believe that was an appropriate or inappropriate accommodation, use of an orator?
A Again, I think it's a fundamental alteration. It would introduce a different level of complexity, because of having a -- having an additional person interposed into that communication chain.

So there would be presumably nonverbal communication and vocal tone -- the other para-verbal information would be the orator's and not the examinee's -- so that would -- we would be assessing to some extent the orator's ability to use nonverbal communication more than we would be assessing the examinee's ability.
Q You are aware that Mr. Hartman took the Step 2 CS exam in June of 2009, correct?
A Yes.
Q And you understand that he passed two of the three subcomponents, the ICE and SEP, correct?
A That's my understanding.
Q Why is it, Doctor, that the NBME can't simply take Mr. Hartman's passing score on the ICE and SEP subcomponents from the June '09 exam, and then Mr. Hartman would only have to

pass the CIS subcomponent?
A So take two scores from one administration and one from another?
Q Yes, sir.
A That would be akin to administering a multiple choice examination where there's 100 questions. And you take the score on 50 of them from the first time you take it, and you take the best 50 from the next time you take it. It's not the same examination.
Q You're aware that the NBME granted Mr. Hartman time-and-a-half on that administration, correct?
A Yes.
Q And you understand that since then, as of September, the NBME has offered Mr. Hartman double time for the Step 2 CS, correct?
A That's my understanding.
Q Do you believe that the offering of time-and-a-half constitutes a fundamental alteration of the skills assessed?
A Probably not. Probably not. I don't know -- and the reason I pause -- there's probably a line somewhere. So at some point, given that we are trying to replicate a clinical interaction between a physician and a patient, there's some point at which time becomes immaterial. Time-and-a-half, probably not. Ten times, definitely.
What's the line? I don't know.

Q What about double time? In the NBME's view, would that fundamentally alter the examination?
A I think that would still be within the acceptable limits.
Q Would the NBME have offered Mr. Hartman the accommodations of time-and-a-half or double time if they had concluded it constituted a fundamental alteration?
A No.
Q Dr. Katsufrakis, did you prepare a declaration on behalf of the NBME as related to the Hartman case?
A Yes.
Q Would you please take a look at Exhibit 35 in the white binder in front of you, defendant's exhibit binder?
A (Witness complies.)
Okay. I'm there.
Q Is this a true and correct copy, to the best of your knowledge, of the declaration you prepared in this case?
A Yes.
MS. LEOPOLD-LEVENTHAL: I'd like to mark Tab 35 as Exhibit D-6, and introduce it into evidence at this time.
THE COURT: Fine.
(Defendant's Exhibit D-6, Tab 35, admitted.)
BY MS. LEOPOLD-LEVENTHAL:
Q I don't plan on going through the exhibit with you, Dr. Katsufrakis, but would ask you: Is everything set forth in your declaration true and correct to the best of your

knowledge, sitting here today?

A Yeah, definitely.

Q There's been an allegation that the standardized patients would be biased against a person with a stutter and might even assume that he's less intelligent than a test-taker without a stutter. That's sort of my way of introducing the subject matter of training of standardized patients.

Would you, please, describe for the Court the training of these standardized patients before they are permitted to participate in a live encounter?

A So the training begins actually before the -- the actor appears, because there's -- there's a lot of work that goes into developing the case, which I won't go into unless you ask me to.

But assuming that's all taken place, a standardized patient is first trained generally about the examination, so familiarized with the proper behavior, the expected -- what we expect of the SPs, what we expect of the examinees, what to do with irregular behavior on the part of the examinee, the normal kind of operating procedures for our SP program.

Then the patient is trained on the specifics of their case, so they'll meet one-on-one for hours at a time on a number of occasions with a case trainer to familiarize themselves with the case. As they become more familiar, their trainer will then test them and role play with them,

the interaction with the SP.

As they get more familiar with the case, then they're also trained on the scoring rubrics that are unique to each case.

Then they go into a -- they do a practice examination with some residents, or other doctors that we've hired, to simulate examinees. And then once they've passed all that, they go into the live examination.

Now, when they're in the live examination initially, they're not scored. We tell examinees that of the 12 cases they'll see in a given day, there may be one, or I think maybe even up two, that are not scored.

So the new SP is in the real environment, but they don't -- their performance and their ratings don't contribute to the actual score of the examinee, until they've done some number. And I don't know what that is. It's probably on the order of 20 to 40, but I don't know exactly how many portrayals they have to do before they're then released into the live examination.

So that's the initial training, and then there's a continuous quality monitoring process. All the interactions are videotaped, so we have quality assurance people who sample the performances of the SPs, and if they identify any training needs, we'll then pull the SP out of the live exam, and retrain them and...

THE COURT: I take it the examinee doesn't know which interviews --

THE WITNESS: No.

THE COURT: -- are not scored?

THE WITNESS: No. Just -- and we do that with our multiple choice questions in the exam as well. Before we -- before we can use an item to contribute to an actual score, we need to know how that item performs under as real conditions as we can simulate.

So we learn for some of the multiple choice questions that on average 70 percent of the people get this one right, versus on average 20 percent of the people get this one right. So that we can then equate between those and make sure that this collection of 300 multiple choice questions is roughly about as hard as this collection that this other examinee sees.

So, too, with the standardized patients. We go through a standardization process, not quite equivalent to that, because it's not having to do with item difficulty, but that's a long-winded of saying, No, the examinee doesn't know. Sorry.

BY MS. LEOPOLD-LEVENTHAL:

Q Does the NBME continue to employ quality control measures to insure that SPs are grading on content, rather than bias, once the person's been trained and is continuing to be an SP?

A Exactly. So part of our quality process that I referred to insures that they continue to portray the content of the case correctly, and that they score the various different elements of the case correctly. So we have a videotape that a trained quality person can look at and compare what she or he would have generated with what the SP generates. And if there's a significant discrepancy, then, you know, we deal with that.

Q Dr. Katsufrakis, are you aware that the NBME has granted other applicants with a speech dysfluency additional time as an accommodation on the Step 2 CS exam?

A Yes, I am.

Q Assuming, for the purposes of my question, that those individuals were disabled under the law, is it the NBME's position that granting additional time to those applicants was an appropriate accommodation?

A Yes.

Q Has the NBME, at any time from 2004, when the test was first put in place, through today, ever approved a request for an accommodation on the Step 2 CS exam, which would have allowed a test-taker to use an electronic substitute for the examinee's speech?

A Not to my knowledge.

Q On one occasion did the NBME permit a hearing impaired applicant to use a dual sign language interpreter on the

test?
A That is my understanding.
Q Would you, please, briefly describe for the Court the circumstances surrounding the NBME's decision to allow a hearing impaired applicant to use the dual sign language interpreter?
A As best I understand the circumstances, there was an examinee who came forward who was deaf mute, and I know that there was substantial review of how best to handle this situation. I don't know the details, but I know that it fell well outside of the routine way that we handle such requests.
My understanding is that ultimately what was allowed was a -- the use of -- I guess it was a couple of interpreters. Basically -- and the way I think of it is -- it would be akin to a foreign language translator, so if -- if I didn't speak English, I spoke Mandarin Chinese, there would be somebody who spoke both Mandarin and English. Well, doing the same thing with ASL for this examinee.
Q Was that individual scored on the SEP subcomponent?
A My understanding was that -- and I think this is the only time this has been done -- we issued a transcript that indicates that SEP was not assessed.
Q What impact, if any, did that nonreport have on the individual's medical license?
A I'm sorry. I don't know the answer to that.

Q Okay. If Mr. Hartman was permitted to use a TTS device, would the NBME be able to compare his performance on the Step 2 CS exam to other test-takers who took the exam under a standard administration?

A No, I mean, it would not be the same examination.

THE COURT: Would you excuse me?

Would you mind if we went back with the witness on one item to the report that was made, to the extent the witness knows about it, in the sign language scenario?

I'm not that I get a sense of what report was made. Some report was made, as I understand it, from what you're saying, and that this deviated from the standard the way it was done.

THE WITNESS: Yes, and I have not seen the transcript. My understanding is that it contains an annotation saying that spoken English proficiency was not assessed.

THE COURT: I see.

THE WITNESS: As I say, I don't think we've ever done that, other than that.

THE COURT: And there was a report with respect to passing or not passing the other two subcomponents?

THE WITNESS: That's my understanding, yes.

THE COURT: Okay.

THE WITNESS: And, actually, as we talk about this,

I think that this individual has not been licensed, but I don't -- I wouldn't want to swear to it further, Judge.

BY MS. LEOPOLD-LEVENTHAL:

Q Moving from the examination setting to a real world setting where doctors operate every day, are you familiar, Doctor, with the phrase "undifferentiated license"?

A Yes.

Q Describe what that phrase means, please.

A State Medical Boards throughout the U.S., typically, without exception, issue an undifferentiated license to practice medicine. Now, I say "typically," because there may be unique circumstances that an occasional board may undertake, but in a physician's license to practice medicine, their license to practice whatever kind of medicine they -- they are qualified to practice, and that's in their own judgment.

So I'm Board Certified as a family physician. I could go out tomorrow -- I couldn't say that I was a Board Certified Plastic Surgeon, but I could say that I perform plastic surgery, and to the extent that I was able to perform reasonably, and that people didn't detect that there was a problem, I could continue in that practice. The regulatory mechanisms available to states are much more reactive to problems than they are designed to identify and insure that people are practicing within the actual scope of their

capabilities.

So an undifferentiated license really gives somebody a license to practice medicine however they choose to.

Q For example --

THE COURT: I --

MS. LEOPOLD-LEVENTHAL: No, please go ahead.

THE COURT: If there's any generalization to be made, I'd be glad to know it, or if there is not, the fact that there's not.

Would it be, in your judgment, likely that most hospitals to whom a -- to which a physician applies for hospital privileges, would be interested in knowing the range of specialties, and perhaps confining the privileges to a particular aspect of practice?

THE WITNESS: I would say probably without doubt. Most hospitals have fairly rigorous processes of credentialing, whereby they go through an initial review process, and often do what's called primary source verifying.

So they go back -- they wouldn't take an attestation from somebody else, say from another hospital that you've completed medical school. They'll go directly back to your medical school and ask for the proof.

So most hospitals that go through that process initially, and then they will recredential people on a periodic basis. Usually on a one, two, or three-year cycle

where they'll typically ask for evidence of continued medical education, and they might ask for evidence, if the surgeon, ongoing practice number of cases conducted, et cetera.

The real problem is not the physician who's practicing within the confines of a hospital, and is an active member of a medical staff, but more the individual who's not a hospital -- is not hospital privileged. In a practice, in solo practice, or in some setting where his or her activities don't come under the same kind of scrutiny.

And there's nothing inherent in the practice of medicine that requires hospital privileges. In fact, right now I don't have active hospital privileges, although I still see patients.

THE COURT: I see. But if you were to get hospital privileges in Santa Monica, the hospital would be likely to make sure that you did not practice ophthalmology in that hospital?

THE WITNESS: To the extent that I wanted to do something within that hospital, they would insure that the scope of my practice was consistent with their review of my records. But I could hold myself -- and, in fact, I could go through the process of obtaining privileges as a family physician with my Board Certification. It might say nothing in those privileges about doing abortions. But in my own office, separate from the hospital, I could perform

abortions.

THE COURT: Mm-hmm.

THE WITNESS: And those would be under nobody's scrutiny.

THE COURT: Got you.

BY MS. LEOPOLD-LEVENTHAL:

Q If Mr. Hartman passes Step 1, Step 2, and Step 3 of the USMLE, would he then be granted an undifferentiated medical license?

A Assuming he met the state's other requirements, yes.

Q Mr. Hartman has testified that he hopes to become a pathologist.

Would you describe what a pathologist does?

A There's a range of things that pathologists can do, but just to kind of think of it, typically a pathologist would examine specimens from patients, and make a determination about disease or pathologies. So when we blood tests done, those are done under the license and supervision of a -- of a pathologist.

Now, in fact, for most of the blood tests that are done these days, it's an automated process run by a computer, but ultimately there's a pathologist who is responsible for those results.

The pathologist's day-to-day activities would probably be more likely involved in direct inspection of

pathologic specimens, either growth specimens or microscopic specimens.

Q Are verbal communication skills important to a physician's role as a pathologist?

A Certainly.

Q Why?

A Well, let me distinguish, when you say "verbal," do you mean verbal or oral, and this is something that we talk about at the NBME?

If you're talking about oral, there's much communication that takes place, verbal communication that can be written, and most communication between pathologists and other physicians around laboratory results is documented in a written record. Now, there may also be oral communication. Not infrequently, a physician will call and speak to the pathologist.

I did this within the past month. I had a patient where I submitted a biopsy and they didn't cap C carcinoma. I was sure it was cap C carcinoma. Well, he hadn't done the correct test for it.

So I had a conversation with him, and he said, Oh, yeah, given that history, I'll do it, and he did it, and found it, and that all worked out.

Probably the more critical scenario where a pathologist's oral communication would be -- would come into

play -- would be around some surgical procedure.

So say you had the misfortune to have breast cancer. Sometimes what's done in surgical procedures is that while the patient is in the OR anesthetized, a specimen is obtained and sent down to the laboratory for a frozen section. And then it's -- there time is of the essence, because the longer somebody is under anesthesia, the greater the chances for any bad complications to occur. So there the report is usually from a pathologist directly to the surgeon telephonically describing the findings.

Q Are there any types of procedures or surgeries or biopsies that would require that sort of instant or speedy analysis and communication between the pathologist and a surgeon, for example?

A Any number where you want to get a frozen section like I just described, and I used breast cancer, because that's maybe one of the more common examples, but there are a number of cancer-related diagnoses -- and I'm just trying to think if there are non-cancer cases.

There's a -- there's a procedure called Mohs surgery, M-O-H-S surgery, and that's used for some kinds of skin cancer. And that's a conservative -- conservative in the sense that you want to conserve as much tissue as you can. Sometimes you've got a large lesion, or a lesion on the face, or some other very prominent area where you want to

take just as much cancer as exists and no more.

So the surgeon would make a first cut, and then the pathologist examines all of the margins, all of the area that had been cut, identifies where those -- if there are areas that still have persistent tumor, so the surgeon can return, carve out, and this is an interview process that may require, you know, any number of excision, examination, communication, excision, et cetera, until all of the tumor is removed.

THE COURT: Mohs, M-O-H-S.

THE WITNESS: M-O-H-S. Yes, I think it's named after the person who first described it or performed it.

THE COURT: Would this kind of process be involved, let say with melanomas?

THE WITNESS: Yes, exactly.

THE COURT: All right.

BY MS. LEOPOLD-LEVENTHAL:

Q If, for example, Mr. Hartman was granted an undifferentiated license, is it fair to say that he could apply for a residency, let's say, in emergency medicine, or pediatrics, or OB/GYN?

A Any medical specialty.

Q Okay. What do residency programs assume when they receive a passing score on the Step 2 CS examination, for example?

A That the individual has demonstrated competency in the

areas that the Step 2 CS assesses.
Q Do you believe it would be appropriate to use a text to speech device either intermittently or exclusively in an emergency room situation?
A Personally I think that you would compromise patient care.
Q Why is that?
A Because high-quality instantaneous communication is necessary. It's critical. Absolutely, I mean, people's lives will depend on that.
Q And if Mr. Hartman was granted an undifferentiated license, is it fair to say that there would be nothing to prevent him from going into, for example, the field of emergency medicine?
A The license would not limit him. He would be free to pursue training in emergency medicine.
Q Doctor, are there certain medical situations, or types of treatments, that would require the physician to hold medical equipment in his or her hands while they're providing medical treatment?
A Yes.
Q Would you provide just a few examples?
A Revisiting those I talked about earlier, the otoscope, the ophthalmoscope, the stethoscope, tuning fork, measuring tape, pin prick, a soft piece of cotton, and then if we get

into the operating room, there's, you know, we don't have -- we don't -- the Judge has asked us to be succinct.

Q What impact, if any, would you use of a text to speech device have on those circumstances where a doctor needs to either hold or work with medical equipment to administer medical treatment?

A I can't imagine that you would be able to use a keyboard, and any of the instruments I've named, simultaneously. So you would have to shift between one or the other activity.

Q Are there certain medical situations where a doctor would need to impart either a sense of calm or a sense of urgency?

A Oh, in the emergency -- you referred to the emergency room previously, so that's perhaps the most dramatic example. But I would in almost every patient encounter, it's important to modulate the communication by either increasing the sense of urgency, communicating to the patient that because they don't have symptoms from their hypertension, that doesn't mean it's not a problem, or conversely, tranquilizing them, providing a calming effect to the patient who is overly anxious for whatever reason.

Q Similarly, are there obviously medical situations where some sort of swift action would be needed to save a life?

A Undoubtedly.

Q Okay.

A And the emergency room presents all manners of

opportunities for that.
Q And what impact, if any, would use of a text to speech device have in a situation where some sort of quick action was necessary?
A Well, assume bleeding. Assume there's substantial bleeding. The text to speech device would delay whatever -- whatever action was needed. If the situation required the physician's direction, and most of those kinds of situations do, then there would be an inevitable delay compared with the ability of the physician to issue verbal -- oral communication.
Q Are there, Doctor, positions in the medical field that Mr. Hartman could pursue, which would not require that he pass the United States Medical Licensing Examination?
A Undoubtedly.
Q Could you --
A He could pursue pathology. Without a -- without a license to practice medicine, he could not be a licensed clinical pathologist. However, he could practice in a research setting, he could work in a hospital where he wasn't the licensed clinical physician, he could work for a drug company, besides doing medicine not related to pathology, but given his expressed interest in pathology, there are other avenues that are available.
Q And if he were to pursue an avenue in pathology, as you

describe, would he be considered a research pathologist?
A I guess it depends upon what his particular interest was. He could, if that's what he wanted to do.
Q And that wouldn't require passage of the USMLE, correct?
A No, that's correct.
Q Is there any danger in allowing Mr. Hartman to take the Step 2 CS exam using the assistive technology, but then him not using that technology when he's out in the field of medical practice?
A Could you ask the question again?
Q Sure.

Assuming that Mr. Hartman utilizes the text to speech on the examination and passes, is there any danger or problem with him then going out into the field of medicine and not using the text to speech device at all?
A I understand. Thank you.
Q Sure.

MR. WEINER: Your Honor, I'm going to object. This matter is about accommodations on the Step 2 CS. There's really no relevancy to what Mr. Hartman may do or intends to do once he practices medicine. There's no indication whether Mr. Hartman's speech dysfluency may resolve itself at some point in history. It's really an irrelevant question and it's hypothetical.

Quite frankly, I'm not sure how the witness has the

ability to testify in this area.

THE COURT: Well, I don't think the -- I didn't think the question is personalized necessarily with respect to Mr. Hartman. I can't remember the vocabulary that was used by counsel. Maybe she used Mr. Hartman, but I take it the question addresses a general category of situations in which an examinee was permitted to have this TTS apparatus employed for the examination process, would it make a difference if such a person were then not to use such a process in the practice of medicine, or in some aspects of it?

I think that's probably a legitimate line of questioning to pursue, to the extent that it may shed some light on what the goals of the examination process are.

So I'll allow it to be pursued and I will not take the question as involving simply Mr. Hartman, but a range of possible examinees.

And in that sense, the fact that, Mr. Weiner, that you classify it as a hypothetical, I don't think that -- I don't think that's troublesome. We have an expert on the stand. I guess -- I'm not sure that we've qualified the witness as an expert except, as I understand it, who is a licensed a physician, at least in Pennsylvania, but for courtroom purposes is an expert on everything within the field of medicine, which may seem an odd ruling, but I think

it's true here.

THE WITNESS: It's consistent with other ways an M.D. license is treated.

Let me just restate the question, as I understand it.

What I heard you ask me is that if an examinee were to use a text to speech device for the CS examination, and then not to use it in practice. So that's the hypothetical. So what's the question?

BY MS. LEOPOLD-LEVENTHAL:

Q Is there any danger? Is there any impact? Does that effect, in your view, that person's treatment of patients?

A As I've -- as I've mentioned, that change fundamentally alters the examination. So the -- so we cannot infer what that result -- what that result would be, and so we cannot attest to the soundness of a license and practice that didn't use the TTS based upon such a test.

Now, going beyond that, I think that my concern would be that the individual who may have been demonstrated to have a degree of proficiency while using a TTS, if that individual didn't use that in the future, that proficiency disappears. So it's device dependent.

Q And I believe I heard you testify earlier as to problems that might be created to the extent that an individual became an M.D. pathologist, where speed and quick communication

might be implicated. Do you recall that?
A Correct?
Q Are those same problems created to the extent that Mr. Hartman, or someone else, would pursue a field as a research pathologist rather than an M.D. pathologist, if I'm using the words right?
A I cannot imagine a situation where a research pathologist would be required to respond to frozen sections in a -- coming from a live operation. So I think there would be a fundamental difference in terms of the impact.
MS. LEOPOLD-LEVENTHAL: Nothing further.
Cross-examine.
(Pause.)

CROSS-EXAMINATION

BY MR. WEINER:
Q Good afternoon, Dr. Kat -- you'll have to forgive me, I have a voice that's fading -- but Katsufrakis.
A And, you know, people call me Dr. K. So if that's easier, save the syllables.
Q Okay. Thank you.
You assisted counsel with the preparation of defendant's answers to plaintiff's interrogatories. Do you recall that?
A Could you --
Q A list of written questions that I had sent to the NBME.

A I believe so.
Q Okay. And I'd like to -- if you'd refer to in plaintiff's binder --
A That's the black one?
Q -- to Tab 32.
A The black one?
Q Yes, and this appears to be the first time I'm using it, so I will mark it as Plaintiff's Exhibit 20.
A And this is defendant National Board of Medical Examiners answers to plaintiff's interrogatories?
A Yes.
Q Okay.

(Pause.)

And under Interrogatory No. 1, the question was: "Identify each person participating in the preparation of the answers to these interrogatories and supply information used in such preparation and indicate the interrogatories with respect to which he or she was involved."

And the response on -- which goes on to Page 2 has your name listed last, and it indicates: "Provided information concerning reasons the use of text to speech technology would fundamentally alter the nature of the service provided."

Do you see that?
A Yes.

Q So is that information correct?
A Yes.
Q Now I'd like you to turn to Page -- it would be 4 -- and the question is: "Describe how the granting of the use of a computer or electronic device with text to speech software to communicate during the patient encounters would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or to result in an undue burden."

Do you see that question, sir?
A I do.
Q And the response is: "The spoken English proficiency, SEP portion of the Step 2 clinical skills, CS examination, is designed to assess the effectiveness of the examinee's spoken English communication within the context of the simulated doctor-patient encounter. The SEP portion of the Step 2 CS includes, but is not limited to, the assessment of the examinee's word pronunciation, and the amount of listener effort required for the standardized patient, the SP, to understand the examinee's spoken question, and spoken responses. Granting the use of a computer electronic device with text to speech software to communicate during the patient encounter will fundamentally alter what the SEP portion is intended to measure by replacing the examinee's spoken language with a written text and computer generated

speech."

Did I read that correctly?

A Yes.

Q And Interrogatory 5, can you take a look at Interrogatory 5?

A The same page?

Q Yes, sir.

A (Witness complies.)

Q And there the question is: "State in detail the reasons for denying plaintiff's request for use of a computer or electronic generated device with text to speech software to communicate during patient encounters on the examination."

Did I read that correctly?

A You stuck in the word "generated," according to the version I have, but that's okay.

Q Okay. I'm sorry. Other than that one correction, is that the question?

A I think so, yeah.

Q And the response to that question is identical to the response to Interrogatory 4?

A I'll take your -- do you want me to look at?

Q If you would like, feel free to take your time reviewing the answer and comparing it with the answer to Interrogatory 4.

(Pause.)

A It looks like they're the same.
Q Okay. In your answers to Interrogatories 4 and 5, and you were involved in the preparation of those answers; is that correct?
A I believe so, yes.
Q And in your answer to Interrogatories 4 and 5, you do not contend in those answers that text to speech software fundamentally alters the integrated clinical encounter, the ICE, correct?
A That's correct.
Q And in your answer to Interrogatories 4 and 5, you do not contend that text to speech fundamentally alters the communication, the interpersonal skills, or the CIS subcomponent; is that correct?
A That's correct.
Q I'd like you to turn to Tab 1.
A (Witness complies.)
Q And this is the content description and general information for the Step 2 clinical skills examination, and this is a document that's published and put out by NBME?
A It appears to be.
Q And this is a document that is available for all the individuals who would wish to take this examination; is that correct?
A Typically it's posted on the web with public access.

Q Right. So anyone could come and review this document?
A Yes.
Q And this provides full information available to the public regarding the examination?
A I'd be reluctant to say "provides full information" --
Q Well, available to the public, correct?
A There may be other information that's available to the public about this examination that's not contained here, but certainly the intent is to provide a comprehensive view of what's -- what the examination involves.
Q And if you turn to Page 10 of the document under Tab 1.
A (Witness complies.)
Q For the description of the ICE subcomponent, nowhere in that description does it use the word "speech" as being something that must be used on the examination, does it?
A And you're looking at the top of the second column?
Q Yes, I am, sir.
A The first line. The two bullets points on the next paragraph?
Q Yes.
A Just a moment. Let me look at that.
(Pause.)
That's correct.
Q And for the description of the CIS subcomponent, nowhere in the description of the CIS subcomponent is it required

that speech be used; is that correct?

MS. LEOPOLD-LEVENTHAL: Your Honor, I would object to that question.

I don't think the witness has testified that these are the requirements. I think they are descriptive in nature as to what is assessed. I think the question as posed is assuming something that there's no foundation for.

THE COURT: Well, I didn't -- I guess I -- I didn't appreciate that the question was put in terms of requirements. I thought we were simply dissecting a description, obviously, an authorized high-level description.

So I'll --

MR. WEINER: I could change my question, your Honor.

THE COURT: -- take it as that. What?

MR. WEINER: I could change my question, if that would satisfy your Honor?

THE COURT: Well, that's the way I'll -- you can change it if you want or I'll simply accept it in those terms.

MR. WEINER: Thank you.

BY MR. WEINER:

Q Does the description for the CIS, in terms of what it assesses, utilize the word "speech" as being one of the items which is assessed in the CS 2 examination?

A Well, the word "speech" is not used.

(Pause.)

I'm just looking to -- I didn't finish the last paragraph.

But, for example, the first bullet point under CIS, questioning scales, examples include use of open-ended questions, transitional statements, facilitating remarks. Those are typically manifestations of speech.

Q But they could be manifestations of some other form of communication; isn't that correct?

A Yeah, I think so. Facilitating remarks, maybe not, but certainly open-ended questions and transitional statements.

Q And going back to my question: Nowhere does it use speech as being one of the items assessed under the CIS, correct?

A I did not see the word "speech".

Q Is it your position that --

THE COURT: I'm not quite sure where this line of questioning takes you.

Is the -- I mean, we're not construing a statute here. If the point is that as of a matter of syntax, questioning skills don't have to be oral, surely that's right, but --

MR. WEINER: Your Honor, this goes to --

THE COURT: -- I wonder if your question doesn't really go to what do those who formulated this description

and published it --

MR. WEINER: Your Honor, this witness went on --

THE COURT: -- what do they have in mind.

MR. WEINER: -- at length about --

THE COURT: Pardon?

MR. WEINER: This witness went on at length as to how text to speech fundamentally alters the measures assessed in the Step 2 CS, for both the ICE and CIS portions, whereas their interrogatory only identifies the SEP portion, and nothing in their content description indicates that assessed speech.

THE COURT: All right. Okay. Go ahead.

BY MR. WEINER:

Q Is it your position that speaking is a skill or knowledge?

A Yes.

Q Are you familiar with the pass rate skills for the spoken English proficiency section, subcomponent for American and Canadian skills?

A Could you ask the question again?

Q Are you familiar with the pass rate results, the historical pass rate results, on the spoken English proficiency subcomponent for past administrations of the Step 2 CS for American and Canadian schools?

A I'm sure I've seen them. I wouldn't say I was familiar

with them.

(Pause.)

Q I'm going to just show you a document which is from NBME's annual report. Do you recognize this document?

A I've seen if not this, something like this.

Q Okay. Does this refresh your recollection --

A Yes.

Q -- or knowledge about the results, the historical results of the Step 2 CS examination?

A Yes.

Q And isn't it true that for all U.S. and Canadian schools, the pass rate for the 2006-2007 year for the SEP subcomponent, was 100 percent?

A Yes.

Q And it's true, is it not, that for all U.S. and Canadian schools for the 2007-2008 year, the pass rate for the SEP was greater than 99 percent?

A Yes, and that applies to first takers, but that's -- yeah.

Q And for the CIS section, for all Canadian and U.S. schools for the 2006-2007, the pass rate is 99 percent?

A Yes.

Q And for the 2007-2008 year for all U.S. and Canadian schools, the pass rate in the CIS component is 99 percent?

A Yes.

Q And for all U.S., Canadian, and Canadian schools for the 2006-2007 for the ICE subcomponent, it's 97 percent?
A Yes.
Q And for all U.S. and Canadian schools for the 2007-2008 year for the ICE subcomponent is a 98 percent pass rate?
A Correct.
Q And the lower pass rate for the ICE subcomponent, when compared to the CIS and the SEP, that's as a result of the patient note; is it not?
A I actually can't say that. It's dependent upon both the patient note and information gathering and -- I'm sorry -- the patient note and the physical examination and history checklists. So somebody could do well on the patient note, but poorly on the checklist items, and so fail the ICE, or the reverse could be true.
Q I guess you could say you didn't know the answer to my question, whether -- whether the higher rate of failure is as a result of the patient notes subsection of the ICE subcomponent?
A So I thought I answered that, but maybe you should reframe the question, because I think you just asked the question I answered.
Q All right. What I was trying to convey is that when the rate of failure on the ICE is as a result of individuals failing the patient note, as opposed to failing the physical

examination.
A Okay. So I did understand what you said, but let me repeat your question to you, and then I'll answer it.
You're asking -- you're telling me that the -- you believe that the ICE fail rate is attributable to the examinee's performance on the patient note, and not to their performance on the physical examination?
Q That's correct.
A Okay. And that's erroneous. The ICE component is made up of the patient note and performance on the checklists which are derived from the history and the physical examination. So an individual could fail on the basis of poor performance on the patient note, or on either of the other two.
(Pause.)
Q And it was your understanding that the only section that Mr. Hartman did not pass was the CIS subcomponent?
A In the June 2009 administration?
Q Yes.
A That's my understanding.
Q That's the only administration Mr. Hartman had taken, correct?
A Okay. I guess.
Q He passed his spoken English proficiency subsection --
A That's my --

Q -- subcomponent?
A That's my understanding.
Q And he passed the ICE subcomponent?
A That's my understanding.
Q And if you'd turn to Tab 4, and that's a copy.
MS. LEOPOLD-LEVENTHAL: In what binder? Which binder?
MR. WEINER: That's plaintiff's binder.
BY MR. WEINER:
Q That would be a copy of the score report for Mr. Hartman?
THE COURT: I'm sorry, where are we looking?
MR. WEINER: This would be Tab 4 of the plaintiff's binder.
(Pause.)
BY MR. WEINER:
Q Mr. Hartman's performance on the patient note fell in the high performance area. Would you agree with that?
A Yeah, and actually this illustrates the point I was just making. If you look at the integrated clinical encounter, you've got data gathering and patient note as the two subscales that make up the integrated clinical encounter, and the data gathering is dependent upon his history and physical examination.
Q Right. So the patient note does not --
THE COURT: Where are we looking?

THE WITNESS: I'm sorry. I jumped ahead to the second page, your Honor.

MR. WEINER: It's Page 2 of Tab 4.

THE WITNESS: There's a -- on the second -- would you like me to describe what that is?

MR. WEINER: I'm sorry.

THE WITNESS: Would you like me to describe this? I'll just shut up and I'll wait for questions.

BY MR. WEINER:

Q No, that's fine. You can describe what this is.

A The way --

THE COURT: I think I may be at the wrong place.

THE WITNESS: It's a couple pages.

THE COURT: I think that -- is this at Tab 4?

THE WITNESS: Yes.

MS. LEOPOLD-LEVENTHAL: Of the plaintiff's binder.

THE COURT: Yes. Oh, plaintiff's binder? All right. I beg your pardon.

(Pause.)

All right. Can we try that again now that I have the --

BY MR. WEINER:

Q I think the doctor was going to explain what's on Page 2 of Tab 4.

A Yeah, so just to orient us all to the score report, the

first page shows the pass-fail outcome, and then the three different components that make that up.

So as I think I mentioned earlier, but an examinee has to pass all three of those components, ICE, CIS, and SEP, and the overall pass-fail for Mr. Hartman is due to his fail on the CIS score.

Then if we look at the next page, this is a way of communicating to the examinee with a little bit more precision where their areas of relative strength and weakness are.

So you can see that the ICE, the integrated clinical encounter, is broken down into data gathering and patient note. The CIS is broken down into what's called questioning skills, but what I've been calling information gathering, information sharing skills, and professional manner and rapport, things that we've talked about previously. And then the last scale, the SEP scale.

And the examinee's performance is reflected by the row of X's for each of those, and then the dark -- dark band in the middle describes sort of borderline performance.

Q Why are some of the bands longer than other bands?

A The better person to ask about that would be Dr. Clauser, but it has to do with the precision of our ability to measure something.

Q And on Mr. Hartman's score report, it reflects that on

the patient note he scored in the higher performance area?
A Correct.
Q And that's actually the highest that he has scored out of all the different areas assessed; is that correct?
A Yes.
Q And his patient note is the one portion of the examination which does not involve any form of speech; is that correct?
A That's correct. Well, actually, that's not quite correct, because within the patient note, he is recording information that he would have obtained through speech, as well as physical examination.

So we are capturing his -- that's his written record of the interaction with the standardized patient. So the information that he is providing in that note is dependent upon his ability to obtain the information, to speak to the patient, and extract that information.

Q And also to conduct a physical examination?
A And conduct a physical examination and -- and reflect it in an organized medical manner.

THE COURT: May I put a question to the witness?

On the Page 2, performance profile, help me with a question with respect to the CIS portion.

THE WITNESS: Mm-hmm.

THE COURT: As I understand the table, would you

tell me if I've got it wrong, the caption for each of the three components. Well, actually, the third only has one ingredient, but the ICE, as I understand it, has the two components, subcomponents of data gathering and patient note, and the line of X's that follows the title "Integrated Clinical Encounter," I assume it represents an aggregate of the scores on data gathering and patient notes?

THE WITNESS: That's correct, your Honor. You understand it correctly. I don't think it's kind of a direct arithmetic summing, but, yes, it's an aggregate.

THE COURT: Well, when we go to the CIS portion, I'm a little puzzled to see that the caption diagram, though I think shorter than any of the subcomponent diagrams, I'd assume that caption diagram after communication and interpersonal skills would be undertaking roughly to aggregate the three subcomponents, the questioning skills, information sharing skills, and professional manner and rapport.

And if that's correct, then I'm puzzled that the aggregate score -- how shall I put it -- stops. It's closest reach into the passing range is not as extensive as any of the three subcomponents.

THE WITNESS: I see what you're talking about, your Honor, and I think I could speculate about the explanation, but I know that Dr. Clauser would be better able to address

that than I, and I'd rather not speculate and give you misinformation.

THE COURT: All right. Now that I've put an incoherent question on the record --

THE WITNESS: No, it's a coherent question. It's just not one the witness can answer.

THE COURT: -- that will be worked out by a later witness.

All right. Thank you.

BY MR. WEINER:

Q Doctor, are you familiar with the USMLE composite committee?

A It depends on what you mean by "familiar," but I know they exist and I have some sort of a sense of what they do.

Q What do they do and what is the purpose?

A They're the -- they're the governing committee for the USMLE program. Now, there's a higher level of governance, because each of the parent organizations, the Federation of State Medical Boards, and the National Board of Medical Examiners, have authority over the composite committee. But if you were going to identify one committee that's responsible for USMLE governance, I think it would be the composite committee.

Q Are you on the composite committee?

A No.

Q Do you review any of their records or minutes of meetings?
A Not rout -- well, I take that back. I was going to say not routinely. In the past I have not routinely, because of my fairly recent assumption of responsibility for revising the USLME, I try to keep more abreast of their activities than I did when I first started at the NMBE.
Q Does the composite committee establish or set forth policies that the NBME follows?
A Yes.
THE COURT: Mr. Weiner, it's 3:30. I think this would be a good time to take an afternoon recess.
We'll recess for 15 minutes.
MR. WEINER: Okay.
THE COURT: You may step down, sir.
THE WITNESS: Thank you, sir.
(A recess was taken from 3:30 o'clock p.m. until 4:01 o'clock p.m.)
THE COURT: Go ahead.
MR. WEINER: Thank you, your Honor.
THE COURT: Pardon?
MR. WEINER: Thank you, your Honor.
THE COURT: Yup. All right.
BY MR. WEINER:
Q Doctor, you were --

THE COURT: I just want to be sure. Yes?

ESR OPERATOR: Yes, yes.

THE COURT: All right. Very good.

BY MR. WEINER:

Q Doctor, you had testified that you're aware of one case where an individual who was hearing impaired utilized a sign language interpreter on the Step 2 CS; is that correct?

A That's correct.

Q I'd like you turn to Tab 32 of plaintiff's binder -- I'm sorry -- 33 of plaintiff's binder.

A (Witness complies.)

MR. WEINER: And I'm going to mark that as Exhibit 21, your Honor.

THE COURT: All right.

THE WITNESS: And this is the one titled, "Supplemental Answers to Plaintiff's Interrogatories"?

BY MR. WEINER:

Q Yes.

(Pause.)

Interrogatory No. 11 says: "State the nature and type of accommodation or auxiliary aids approved by defendant for persons with impaired speaking, hearing, or vision, that has been provide to other examinees on the examination for each accommodation or auxiliary aid identified in Interrogatory 11 above, state the dates and/or frequency, the

accommodation, or auxiliary aides was approved."

Do you see that as Question 11?

A Yes, yes.

Q And if you turn to Page 2, there is a chart there.

A Okay.

Q There's an entry there for 12/29/2005. Do you see that?

A Yes.

Q Then it says, "Hearing Impairment" in the next column?

A Yes.

Q And it says, "Signing two way interpreter, additional five minutes for patient encounter."

A Right.

Q Signing two way means that the examinee is signing to an interpreter and then the interpreter is signing to the standardized patient, correct? And vice-versa, the standardized patient will communicate with the interpreter who will then sign to the examinee?

A Correct.

Q And in that particular case, the standardized patient is not speaking at all -- I'm sorry -- the examinee is not speaking at all to the standardized patient, correct?

A Correct.

Q And in that particular case, the spoken English proficiency could not be assessed, correct?

A Correct.

Q And there's a second entry there for 2/8/2007?
A I see that.
Q And this is for a hearing impairment?
A Yes.
Q And it says, "Additional five minutes for patient encounter. Signing two ways interpreter."
A Yes.
Q So here's a second case where there was a two-way interpreter, correct?
A That -- that's what the record suggests, yes.
Q All right. And so this is a second case where sign language was being used for the Step 2 CS examination? Is that a yes?
A It seems -- yes -- that seems to be the case.
Q And --
THE COURT: I'm not -- I want to be sure you're -- I understand your questions.
In the two way as distinguished from the one way signing, you're talking about a situation in which the -- both the examinee and the standardized patient -- well, I guess I don't -- I'll try it again.
Can you find out from the witness --
MR. WEINER: Sure, your Honor.
THE COURT: -- what's going on in the two way interpretation?

BY MR. WEINER:

Q With a two way sign language interpreter, the examinee, the test-taker in other words, is signing to an interpreter, correct?

A If you're trying to distinguish between the two way and the one way entries, I would just suggest that you'd be better off asking the next witness, because I'm not -- I'm not knowledgeable about the details that underly the information in this table.

Q Again, you're not familiar with the distinguishing difference between a one way --

A I --

Q -- sign and two way sign?

A -- I can speculate, but I don't know how that was applied at the NBME to create this table, and so I think my answers might mislead you.

Q Okay. But going back to your previous testimony, you said there was only one case where a sign language interpreter was used?

A That was my understanding, yeah.

Q The answers to these interrogatories suggest that there were two cases; is that correct?

A They do to the extent that my interpretation of these is correct, but as I've just indicated, I -- I wouldn't trust that, because I don't know what went into preparing this

table.
Q Have you, in the past, reviewed any of the composite committee reports to get an understanding of what a particular policy was that has been set forth by the NBME?
A I don't think so. I think when I reviewed the composite committee minutes in the past, it's mostly been to have a general understanding of what the issues were that the composite committee considered. As I mentioned previously, most particularly where those issues pertain to changes to the USMLE exam.
Q When you were talking before about the sign language interpreter, and that individual did not receive a license, what was that based on?
A A conversation with other NBME staff.
Q Okay. So you haven't reviewed any official policy or any official information about what really occurred, did you?
A That's correct.
Q Okay. Have you reviewed any composite committee reports regarding the policy on how the NBME will handle sign language interpreters?
A No, I can't think of one.
Q Would you agree that some students taking the Step 2 CS may speak more than others?
A Almost certainly.
Q And is it fair to say that some test-takers may speak

many words while others may speak fewer words?
A Yes.
Q And the standardized patient's able to assess both those individuals?
A Yes.
Q Has there ever been an occasion where a test-taker, under standardized conditions, could not be assessed under the spoken English proficiency section, because they didn't speak enough?
A I -- I don't know of one. It would be hard for me to imagine the situation that would meet those conditions.
Q How much must one speak to be assessed on the spoken English proficiency subcomponent?
A Enough.
Q What does that mean?
A It means that you need to speak enough to accomplish the tasks that the particular case demands.
Q Well, do the standardized patients do any kind of a measurement of that, in terms of minutes, or the amount of words that one speaks?
A I'm not aware of any quantitative measure like that, that standardized patients use to -- to assist them in coming up with their SEP score.
Q Do the score sheets or rating sheets that the standardized patients use reflect how much a test-taker must

speak?

A I think not -- probably not in the way that you're saying. I think that behind your question is -- I wish to try to understand -- if there's sort of a quantitative requirement that a patient speak X number of words per minute or in total that they speak X number of words.

I think the way the standardized patients address SEP is that of the communication that occurs, in the context of fulfilling the other elements of the case.

So I mentioned previously that what we try to do with the clinical skills examination is predict how effectively a physician will interact with patients in an ambulatory clinical setting by -- by mirroring that, to the extent that we can -- in standardizing that using the procedures that we've discussed today.

The scales that we use, to some extent, are -- well, they're imprecise. If we had a way that we could measure the totality of the interaction, that's what we want. Lacking that, we -- we have identified -- we have created these artifacts, if you will, really, these constructs that attempt to get at the issues that we think are most important, the competencies that we're wishing to measure.

So we've created something that we call SEP, because we think measuring spoken English proficiency is important, but it's not something that's measured in the abstraction or

in isolation from the rest of the encounter. And it sort of gets back to, I think, you're questioning about passing the SEP score on one occasion, and passing CIS on another, or something like that.

We really are considering the whole encounter, or the whole body of 12 encounters, and the scores that we create are just a systematic kind of standardized way that we use to capture this performance.

Q All right. When Mr. Hartman took the examination in June 2009, he had time-and-a-half for each patient encounter; is that your --

A That's my understanding.

Q And they were able to assess his speech in that particular encounter?

A My understanding is that the passed the SEP.

Q And they were able to assess the amount he spoke directly?

A Correct, correct.

Q And if you would turn to Tab 15 of plaintiff's binder, and I'm directing you to Page 7.

A (Witness complies.)

Q This is a copy of Dr. Tetnowski's report who had assessed Mr. Hartman.

Had you ever reviewed this report?

A No, I have not.

Q On Page 7 Dr. Tetnowski wrote, "Aaron indicated that he had been practicing using a small text to speech" --

A I don't know where you're reading.

Q I'm sorry. On Page 7.

A Yes, where?

Q Under "Additional Information" --

A Okay.

Q -- the second sentence.

A Okay.

Q And it begins with: "Aaron indicated."

A I see that.

Q All right. It says, "Aaron indicated that he had been practicing using a small text to speech device that would allow him to communicate more readily. Since Aaron was not able to effectively and independently communicate in any other fashion, a role-playing scenario was played out between the examiner and Aaron. During this task, Aaron spoke short words using many nonverbal behaviors, nodding for information, et cetera. He often attempted to speak, but when he came across a severe block or repetition, he would type a response on his portable computer, which converted his ideas to computerized speech output. Although the method was somewhat slow, it was indeed faster than any other form of communication that Aaron exhibited prior to his attempt."

Do you see where it says that?

A Mm-hmm, I do.
Q So in Dr. Tetnowski's opinion, he's indicating that Mr. Hartman can speak more than he would be able to speak spontaneously. Do you understand that?
A What I understood was that Dr. Tetnowski said that Aaron could communicate faster, more than he could speak.
Q Yes.
A Yeah.
Q But, no, he's saying he can speak more than utilizing the text to speech than he would if he was just to speak by himself.
A Well, that's not what I read. He said, "Although the method was somewhat slow, it was indeed faster."

So I don't see him saying Aaron spoke faster. What he said was the method. It was faster.

Q If Mr. Hartman can speak more utilizing the text to speech, wouldn't the standardized patients have as much or a better ability to assess the spoken English proficiency than he would at time-and-a-half?
A I think you're conflating things. You're saying speech using the machine and that's not speech in the context of the construct we're measuring with the CS exam.
Q Let me correct you.

If he can speak more, when utilizing text to speech, they would be able to assess him just as well, if not better

on such an examination, than they did when he had time-and-a-half and spoke spontaneously.

A Let me make sure I understand the -- the hypothesis.

You're saying that if he were to speak orally, and when he gets -- when he has difficulty doing that -- he resorts to the text to speech device, and that situation, that system would allow more words to come out of his mouth than if he didn't have the device; is that what you're asking me?

Q That's correct.

A Okay. So could you frame the question again then?

Q So under those circumstances that you just said, wouldn't he be able to be assessed just as well, if not better, on spoken English proficiency on the Step 2 CS examination?

A I'm not sure that it would be better. It would be different.

Q But they would be able to assess his ability to speak English, wouldn't they?

A As they would in the other case. I mean, I think -- if the assessment would still take place, I think the challenge would be training the SP's how to use or not use information coming from the machine.

Q What's the problem if he's able to write the words in English, and have the text to speech generate English words, what's the problem?

He's still showing a command of the English language.

A It's just not the construct that we're measuring.

Q You've never evaluated Mr. Hartman's use of text to speech, have you?

A Other than what we've talked about today, no.

Q All right. And you haven't seen him utilize text to speech; is that correct?

A That's correct.

Q Are you familiar with how the Step 2 CS was developed?

A It depends on how you define "developed." To some extent, yes.

Q Well, in developing the Step 2 CS, do they coordinate with other medical schools, or officials from medical schools, to get an understanding of what their curriculum is?

A I don't know that they did it to -- I honestly don't know whether they tried to understand curriculum.

I know that there was some testing of cases that the NBME had developed in medical school settings where the schools had up and running standardized patient programs.

Q All right. Well, is it fair to say that the Step 2 CS examination would not be testing or would not provide a situation which was not part of a curriculum in medical school?

A Well, the way I would -- the way I would frame -- the way

I would address what you're raising is that typically the USMLE tries to measure the constructs that are important to patient care, where we can do that reliably and in a valid fashion. And typically by the time the NBME is able to do that, other medical schools are doing that as well.

So medical schools, to some extent, serves as a breeding ground for innovation. That's probably a good way to think about it.

Q I'm not sure I understood what you meant.

A Okay. There are now robots that cost a quarter of a million dollars, that some schools are using to simulate physiologic responses that patient's have. So we no longer have to sacrifice dogs to teach medical students how different drugs work.

That's probably not something that the NBME is going to be doing in the foreseeable future, but schools are working on simulations, and it may well be at some point in the future the NBME would adopt some -- some form of simulation as part of our USMLE examination.

Q Okay. Let me try to simplify this: If it is something that is taught in medical school, it's something that would possibly show up on the Step 2 CS examination?

A I would say that the universe of what's taught in medical schools is bigger than what would necessarily show up on our examinations.

Q Okay. And going the other way, it's not like they let you have something on your examinations that wouldn't be taught in medical school; is that correct?
A At least not in -- at least not in some medical schools, that's correct. Maybe not in all.
Q Do American medical schools teach you how to speak English?
A Not that -- I'm not aware of it being a formal part of any medical school's curriculum.
Q Okay. When you went to medical school, they didn't teach you how to speak English --
A No.
Q -- is that correct?
A That's correct.
Q And there's no test administers that you're aware of in American medical schools that tests your English proficiency?
A I don't know what medical schools do for applicants coming from other countries.
Q I was referring to American medical schools.
A But American medical schools will admit people from other countries, so I would say I don't know what -- what they do in that situation.
Q Would you agree that the purpose of the Step 2 CS is to assess the ability of examinees to apply medical knowledge, skills, and understanding of clinical science essential for

the provision of patient care under supervision, and includes emphasis on health promotion and disease prevention?
A I think you're reading from our bulletin, so --
Q Yes.
A -- I'd be a fool to disagree with that.
Q Okay. And the SEP assesses frequency of pronunciation or word choice errors?
A Amongst other things, yes.
Q Right. And also how it effects listener comprehension?
A Among other things, yes.
Q And the SEP also assesses the amount of listener effort required to understand the examinee's questions; is that correct?
A Correct. Questions, and I think other things the examinee says, too, not just questions.
Q Let me provide an example.

If I took a complete medical history of a standardized patient, it would not be assessed in the SEP subcomponent; is that correct?
A Well, we actually don't require a complete medical history as part of our CS exam. We have a focus history.
Q Okay. Let me rephrase.

If I were to take a medical history --
A A focus history.
Q A focus history on the Step 2 CS, that would not be

assessed under the SEP portion; is that correct?
A Well, it would, because you're going to be taking a history and speaking to the patient, collecting the information, so --
Q If I did it improperly, that wouldn't adversely effect the SEP portion; is that correct?
A If you did what improperly?
Q Take a history. That would be some other subcomponent that --
A It would depend upon the nature -- and when you're saying "improperly," I would need to have more specificity. So if you told me -- if you could describe more clearly what's improper, then I could tell you whether or not it would fall into SEP or something else.
Q Well, a medical history isn't scored by -- under the SEP; is that correct?
A The taking of a medical history is part of the interaction with the patient, so it does contribute to the SEP.
Q But if someone does it wrong, it's not SEP that would give you an adverse --
A If they ask --
THE COURT: What do you mean by "wrong"? Maybe that would help.
BY MR. WEINER:

Q If someone takes an incomplete history.
A If they had -- if they spoke English clearly, used appropriate words, were not overly difficult in their conversation for the SP to understand, et cetera, and they failed to ask sufficient numbers of questions, or the right kinds of questions, or focus on the right areas, then assuming that behavior generalized to all 11 other cases, they should pass the SEP, and the deficiency in the history gathering would probably be reflected both in the -- the ICE, the part that depends upon information gathering, and could also be reflected on the patient note, because they may have not collected the information that they needed to record on the patient note. It might have also been reflected in the information gathering subscale of CIS.
Q Okay. And if I was taking the Step 2 CS, if my examination was incomplete, that would not be adversely reflected in the SEP; is that correct?
A Sorry, if your exam -- say that again, please?
Q If my examination was incomplete --
A Physical examination?
Q Physical examination was incomplete, that would not be reflected in the SEP; is that correct?
A If it were incomplete, no.
Q Okay. If I wrote the wrong diagnostic examination, that would not be adversely effected in the SEP; is that correct?

A Assuming that you either didn't talk about it with the patient, or if you did talk about it, your speech was fluent, and appropriate words, you know, they're the things -- they're the qualifiers I made about SEP.

Q Right. If I used medical jargon, that would not adversely effect the SEP; is that correct?

A No, the medical jargon would typically be captured under CIS.

Q And if I asked close-ended questions, or leading questions, that would not adversely effect the SEP; is that correct?

A Correct.

Q However, if I was to a student from India, and I, during the course of the examination spoke Indian, that would be adversely effected in the SEP, correct?

A If that's all you spoke?

Q Or I spoke a sentence in Indian. Wouldn't that potentially adversely effect my SEP score?

A I'm not sure. I guess we'd have to -- I think we'd have to look at the entire encounter in its totality. I don't think we could --

Q I'm not saying it would necessarily be a failure, but what I'm saying is the standardized patient would look at that and perhaps give me an adverse mark or something, because my word choice was wrong, correct?

A Or perhaps not. I can imagine a circumstance where an examinee might do that inadvertently, or even consciously translate it for the SP or for the -- yeah, for the SP -- and then make a joke about, you know, sorry, I was thinking in Indian, and didn't translate it, you know, sort of laughing at himself.

Q If, for example, I was a Japanese student, and I had a very heavy accent, and it was difficult to understand me, that would be something that would be adversely reflected in the SEP; is that correct?

A If -- if -- if an SP has difficulty understanding somebody who has a very pronounced accent, such that it makes understanding the words difficult, then that would be reflected in the SEP.

Q Right. And if I was a Russian student, and the SEP -- I mean the standard patient asked me to repeat my communication to them over and over again, that would be something adversely effected in the SEP; is that correct?

A It might be. It could be that we would build that behavior into the case to see how the examinee responded to that kind of challenge by the examinee -- the SP.

Q Well, in the content description, doesn't it say repeating information would be something that would -- would be adverse in the SEP?

A Well, the situation you posed was asking the examinee to

be responsive to a request from the SP.

I think when you talk about the repeating information, the intent there is more of the situation where an individual just keeps asking -- keeps asking questions as if they're not even paying attention to the answers, or says the same thing over and over again.

MS. LEOPOLD-LEVENTHAL: Your Honor, if I could interrupt for a moment? Dr. Katsufrakis has to catch a plane and I know he was trying to leave by 4:30 in order to make that plane.

MR. WEINER: I probably have less than five minutes.

THE COURT: All right. Let's make --

MS. LEOPOLD-LEVENTHAL: I have a few follow-up questions, too. I don't know what we want to do. I don't want to jeopardize his plane.

THE COURT: Let's try and make it two minutes.

MR. WEINER: Two minutes? All right.

THE WITNESS: And I'm the most interested, so I'll be happy to keep time if you guys would like?

BY MR. WEINER:

Q The SEP, is it fair to say that it's more about the delivery of the communication, and not the content of the communication?

A No, I wouldn't say that. The content -- if you think about the effort that the SP must exert to understand, that's

going to be dependent upon the content.
Q Yes, but the content is really measured more in the CIS and the ICE; isn't that true? I mean, that's the true medical information that's being communicated.
A I think the -- my sense is that the CIS, the CIS, is focused on content, yeah.
Q Is it your understanding that the Step 2 CS was developed from a previous test which was from the --
A ECFMG.
Q Yes.
A Yes.
Q And that was --
A I don't know if it was developed from. I would say that it was developed in consultation with the ECFMG, and that the -- I'm assuming that the development benefitted from the experience that the ECFMG had.
Q And just so his Honor knows, the ECFMG is the Educational Commission for Foreign Medical Graduates, Clinical Skills Assessment?
A Correct.
Q And that has some of the same subcomponents as the USMLE Step 2; is that correct?
A I'm actually not familiar with what he clinical skills assessment had.
Q Are you familiar with the fact that the ECFMG was just

administered to foreign students?
A I knew that that's the -- that's the ECFMG's business, yeah. They certify international medical students. And it's not just actually foreign students, because it's students graduating from medical schools outside the U.S. Many U.S. students, U.S. citizens, who are unable to get into U.S. medical schools would pursue international education, and they would come back and also be subject to the ECFMG's clinical skills examination.
Q In your discussion about the undifferentiated license, when you had mentioned that could virtually practice anything you want to do once you have that license. Do you recall that testimony?
A Yeah.
Q The reality is, the practical reality is, if you're a family doctor, such as yourself, and you want to do surgery, you're going to go into a surgical residence; isn't that true?
A Actually family medicine encompasses surgery as well, and I was --
Q Well, it's --
A -- I was trained -- actually I've done probably two dozen Cesarian sections in my life.
Q Well, what --
A And could go out and do abortions today if I wanted to.

Q Well, what about orthopedic surgery? You're going to go through a five-year orthopedic surgery --

A No.

Q -- to do that; is that correct?

A If I were going to do a hip joint replacement? Definitely.

Q And the reality is in this world, is that people who are family practitioners, are not doing orthopedic surgery?

A That's not true. That's not true.

Q Wouldn't that be unethical to do that?

A Not at all. Family physicians have a very broad scope of practice, and so it's routine, particularly in rural areas, for family physicians to assist on all manner of cases. Right out of residency, I assisted on neurosurgery. I was doing a locum tenens for a physician.

Q You said "assisted." You were not doing neurosurgery yourself; is that correct?

A I wasn't doing neurosurgery independently. That's correct.

Q But the fast majority --

THE COURT: Mr. Weiner, we really owe it to the witness --

MR. WEINER: Okay.

THE COURT: -- to wind up. You have two, three, critical questions?

MR. WEINER: I will finish there, your Honor.

THE COURT: Pardon?

MR. WEINER: I will finish with what I just said.

THE COURT: All right. Well, then, I take it that you have nothing further for the witness?

(Pause.)

MS. LEOPOLD-LEVENTHAL: Two questions.

REDIRECT EXAMINATION

BY MS. LEOPOLD-LEVENTHAL:

Q The Step 2 CS does not measure someone's ability to write English, it's speaking English, correct?

A Correct, except there's also writing that's involved with patient note.

Q For assessment purposes, is there a difference between speaking less than another test-taker and typing and speaking?

A Yes.

Q Okay.

MS. LEOPOLD-LEVENTHAL: Thank you. No further questions.

THE COURT: Okay. Thank you, sir.

THE WITNESS: Thank you, your Honor.

THE COURT: I hope you catch your plane.

THE WITNESS: Oh, I shouldn't have any problem, as long as there's no traffic.

Thank you, all.

(Witness excused.)

(Discussion held off the record.)

THE COURT: Before you get started with your next witness, I apologize for doing this, but I'm going to have to take ten minutes to get things in order back in the office, since I'm not going to be here tomorrow.

So we'll take ten minutes and my thought is then that we will go on until about quarter of 6:00, all right?

(A recess was taken from 4:33 o'clock p.m. until 4:55 o'clock p.m.)

THE COURT: Please sit down.

It's really, from my point, not necessary for everybody to rise when I come in, and I know that's expected protocol, but I've never quite figured out what the reason for it is.

(Laughter.)

I just say that in the confidence of this room. You won't tell any of my colleagues, certainly no other lawyers.

Very good. Do you want to call your next witness?

MS. LEOPOLD-LEVENTHAL: Dr. Farmer.

CATHERINE FARMER, after having been first duly sworn as a witness, was examined and testified as follows:

THE COURT: Catherine with a C?

THE WITNESS: With a C.

THE COURT: In my family it's with a K.

THE WITNESS: I won't hold that against you, your Honor.

DIRECT EXAMINATION

BY MS. LEOPOLD-LEVENTHAL:

Q For whom do you work, Dr. Farmer?

A I work for the National Board of Medical Examiners.

Q Would you briefly describe for his Honor your educational background?

A I have a Doctorate in Clinical Psychological, a Master's of Health Education, Bachelor's in Biology, and I'm a licensed practical nurse by training.

Q What is your current position with the NBME?

A The title is the manager of Disability Services and the ADA compliance officer for testing programs.

Q For how long have you held that position?

A I've been in that position since September 2006.

Q What does the Disability Services group at the NBME do?

A We're tasked with receiving requests for test accommodations for examinations. We review those requests. Grant or deny the request for accommodations. And if it's granted, assure that the appropriate accommodation is delivered.

Q What are your job duties and responsibilities as the manager of Disability Services and ADA compliance officer?

A I'm responsible for overseeing the day-to-day operations of the unit, for developing procedures and policies of the unit. I'm also responsible for reviewing each individual request and making -- rendering a decision whether to deny or to grant the request.

Q Have you provided me with your current curriculum vitae in the context of this litigation?

A I have.

Q And if you would turn to Exhibit 24 in the defendant's exhibit binder, the one with the white page on top.

A I'm sorry. Which tab?

Q 24, please.

A (Witness complies.)

I have it.

Q Do you believe this to be a true and correct and accurate copy of your current C.V.?

A Yes.

MS. LEOPOLD-LEVENTHAL: I'd like to mark Dr. Farmer's C.V. at Exhibit Tab No. 24, as D-7, and unless there's any objection, I'd move it into evidence at this time.

MR. WEINER: No objection.

THE COURT: Of course. Glad to have it.

(Defendant's Exhibit No. 7, Tab 24, admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q Briefly describe for his Honor the professional positions you've held prior to joining the NBME.
A Prior to joining the National Board?
Q Yes, please.
A I had worked as a licensed practical nurse for several years, in clinical settings, inpatient settings. I've also done home care nursing for individuals who are infirmed or ill who wish to stay at home.
Q You've been in the courtroom for much of this trial, and I may be asking you questions referencing prior testimony. I had intended to ask you about the Step 2 CS examination, but Dr. Katsufrakis went first and he already answered those questions. So let's jump right into that examination.
Very briefly, if you would, describe what the Step 2 CS examination examines or assesses?
A It's a clinical skills examination that utilizes standardized patients, and it's measuring the application of skills and knowledge by individuals who are seeking initial licensure to practice medicine, and it's looking for their ability to gather information, synthesize that information, communicate that information, to the standardized patient and to other healthcare professionals.
Q Does the NBME have a website that describes the Step 2 CS examination?
A Yes.

Q And is there a document that a prospective student or anyone can click on to -- which provides a description of that examination?
A Yes.
Q What is that called?
A For each individual examination, there are content descriptions and I believe it's called an information booklet.
Q Would you take a look at Exhibit 1 in the same binder?
A (Witness complies.)
I have it.
Q And is that the content description and general information booklet 2009 for the Step 2 CS examination?
A Yes, it is.
Q Okay. And then if you'd look beyond the end of that document, there's another one in the same -- under the same tab, and that's the 2010 booklet, correct?
A That's correct.
MS. LEOPOLD-LEVENTHAL: I'd like to mark the 2009 and 2010 content and description and general information booklet as D-8, and move it into evidence at this time.
THE COURT: All right.
(Defendant's Exhibit No. 8 was admitted.)
BY MS. LEOPOLD-LEVENTHAL:
Q Directing your attention to Pages 10 and 11 of either the

2009 or 2010 booklet, do these pages describe the scoring or the skills that are assessed for the three subcomponents of the Step 2 CS exam?

A They do.

Q And we understand that Step 2 CS is broken down into three subcomponents, and that's just for grading purposes, correct?

A That's correct.

Q What information, generally speaking, is provided in that information booklet?

A The information, I think, contains -- the information is provided to students so that they can prepare themselves to take the examination. It talks about the way the exam is administered, and obviously the way that -- that it's scored. And I think it even gives examples of the patient note format, and some abbreviations and acronyms that are acceptable.

Q How many locations are there in the United States where a prospective student can take the Step 2 CS examination?

A There are five locations.

Q And how frequently are the examinations available on the Step 2 CS to a prospective test-taker?

A My understanding is it's continuously delivered. That there may be a couple of weeks during the year where the centers close down for retraining of the staff.

Q Doctor, do you have an understanding of what the legal definition of a disability is?
A I believe so, yes.
Q And what is your understanding of that term?
A My understanding is from the Americans With Disabilities Act, as it's been amended in 2008, that the definition of a disability briefly stated is a substantial limitation in a major life activity.
Q Doctor, how did you come to have that understanding? Where did you learn that information?
A It's really been on-the-job training. With this position at Disability Services that I've come to be informed and educated about the -- our responsibilities as a testing agency under the Americans With Disabilities Act.
Q Describe briefly the training you've received while with the NBME, which had educated you regarding what the ADA's definition of a disability is.
A It's been both informal and formal training. I work directly -- my supervisor is an attorney, and I work closely with general counsel in the Office of Legal Services at the National Board, again, to be informed and educated about the relevance of the ADA for testing programs.

I also attend seminars, and trainings to keep up to date with the changes in the ADA, and the regulatory guidelines that seem to be changing regularly as well.

Q So you've received, then, specific training while with the NBME about how the ADA is interpreted and applied with respect to the testing situation in particular?
A That's correct.
Q Doctor, is this a one-time training that you receive on the ADA, and on disability, or is this more of an ongoing process?
A It's an ongoing process.
Q Are you familiar with the phrase "auxiliary aids"?
A I have heard that, yes.
Q Okay. And what does that phrase mean in the context of the ADA?
A I think of it -- as auxiliary aids as being sort of external devices, or mechanical devices, or something that an individual might use to help bridge the gap of their impairment, so that they could function more normally.
Q Would you please provide the Court with some examples of auxiliary aids that the NBME has provided to test-takers with disabilities for the Step 2 CS examination?
A Certainly. For the Step 2 CS examination, individuals with hearing impairments have requested the use of something as simple as their hearing aids. They also would ask for an amplified stethoscope that would help augment the sound over that of a standard stethoscope.

Individuals with vision impairments have asked for

things like as simple as a magnifying glass, some use some higher technology, telescopes I believe they call them, so that they can augment their vision.

I would even expand the terminology of auxiliary devices to assistive devices for individuals who have some medical conditions such as chronic pain conditions use something called a TENS device. It's a bit of a nerve stimulator that, again, helps them stay more pain free during the course of the examination. Diabetics use their insulin pump, administer insulin, and check their blood glucose during the exam.

So I think of those as examples of assistive or auxiliary aids.

Q Are you familiar with a Speech Easy device?

A I am, And we, in the context of the Step 2 examination, the first time.

Q And is that an auxiliary aid as well?

A I would consider that an auxiliary aid.

Q What is that device?

A My understanding is that it's a device that fits into an individual's ear. Individuals who have a stutter use this device. It provides really their own voice as feedback, slightly delayed, I believe, so that they're essentially speaking with their own voice. My understanding is that for some individuals who stutter, it deceases the dysfluencies

for them significantly.

THE COURT: What was it called? I guess I didn't get its name?

THE WITNESS: It's called a Speak Easy. I think that's the --

THE COURT: Speak Easy.

THE WITNESS: -- trade or the proprietary name, your Honor.

BY MS. LEOPOLD-LEVENTHAL:

Q Is it your understanding that when a test-taker with a stutter uses the Speak Easy device, that that doesn't impair or effect their ability to continue to maintain eye contact with the standardized patient?

A Not to my knowledge.

Q Okay. What is the purpose of the NBME granting a test-taker the use of an auxiliary aid like those you've described?

A Again, I think the individual requests these things to help bridge the gap or to ameliorate a condition or a symptom that they might have. Probably very similar to that of an accommodation. It's to remove a barrier actually that that individual has in interacting with the examination.

Q Briefly describe for the Court the procedure that the NBME Disability Services group follows each time a request for an accommodation is received? And these are in general

terms.
A Certainly. Without belaboring the point for the Court, individuals will submit their documentation, their request for us. We do a review inside to audit it to make sure that there's enough information for us to make an informed decision about the accommodation. If we believe there is not enough information, we'll communicate with the examinee to provide us more detailed information.

Once we've received complete submission, we may send it out to -- we usually send it out to an external consultant who's an expert in that area of disability. That individual writes a written report, which I'll review, along with reviewing the individual's complete documentation and submission, and at that time I'll make a decision whether to grant or deny.

Q How do you determine when to send a file out to an outside consultant for review?
A I would say more often or actually I would say quite frequently the requests need to be sent out. Occasionally an individual will make a request, and their own expert, or they, themselves, will indicate that they do not have a disability, a condition that rises to the level of a disability. And in that case, I would not send it out.
Q When was your first involvement with Aaron Hartman's request for accommodations on the Step 2 CS examination?

A I believe his first request was received by us in July of 2008.
Q Would you, please, turn to Exhibit 2 in that same exhibit binder?
A (Witness complies.)
I have it.
Q What is this document?
A This is the United States Medical Licensing Step 2 Clinical Skills Application for Test Accommodations. This is a form that an individual who's requesting accommodations would fill out to indicate their biographic information, what type of disorder or impairment they have, what type of accommodation they're requesting, and a little bit of history about how they've been or not been accommodated in the past.
Q And is it fair to say this was Mr. Hartman's first request, formal request form that he submitted for accommodations on the Step 2 CS?
A It is.
Q And he submitted that when?
A It looks like we time-stamped it July 24th, 2008. That's the date we received it.
Q And if you turn to Page 3 of Mr. Hartman's request, what did he indicate he had been granted at Stoneybrook as an accommodation for his speech dysfluency?
A It looks like that's on Page 4 under the medical school

accommodations.
Q Yes.
A I'll read the submission. It says he was -- in the clinic area, received extended time for oral exams, for objective standardized clinical exams, I was given two times to complete the history and physical on a standardized patient.
Q And this was Mr. Hartman's description of the accommodations he had previously received with respect to his speech dysfluency; is that correct?
A That's correct.
Q Why is it that the NBME asks applicants for accommodations to describe the accommodations he had been granted prior or another setting?
A Well, it's helpful information to understand what they have or haven't needed in the past, and what they've used, and whether those accommodations have been given consistently or intermittently.
Q What accommodation was Mr. Hartman seeking in this first application for accommodations?
A He requested double time on the CS patient encounter section, so that would be 30 minutes for the encounter.
MS. LEOPOLD-LEVENTHAL: I'd like to mark Exhibit 2 as Defendant's Exhibit 9. I'd move that into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 9 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q What else did Mr. Hartman submit in June of 2008, in support of his request for accommodations?

A In July of 2008, in addition to the request form, we received a personal statement written by Aaron to describe the accommodation he was seeking and the reason for that. I believe we also received some documentation from Stoneybrook, his medical school, confirming that he had received accommodations prior at medical school. I believe there was a report from a Leslie Oldemeyer.

Q Was that the sum total of the documents he submitted at that time?

A I believe so.

Q And in that application, Mr. Hartman was not requesting use of either an orator, or a text to speech device, or any other assistive device; is that correct?

A That's correct.

Q Did you review all of those documents in conjunction with Mr. Hartman's accommodations request?

A Yes, I did.

Q How much time, if you know, did you spend reviewing Mr. Hartman's request and those materials that you identified?

A Oh, gee, it's hard to say now retrospect. I, like I

said, review each request personally. Then I review it a second and a third time when I get the recommendation back from the consultants. So it was probably several hours.

Q Please turn to Exhibit 3.

A (Witness complies.)

Okay.

Q Would you identify that document, please?

A This is Mr. Hartman's personal statement that was received July 24th along with his request form.

Q Do you believe that's a copy of the original personal statement that he submitted?

A I do.

MS. LEOPOLD-LEVENTHAL: I would like to mark the document at exhibit Tab 3, as Defendant's Exhibit 10, and move that into evidence at this time?

THE COURT: Sure.

(Defendant's Exhibit No. 10 was admitted.)

THE COURT: All right.

BY MS. LEOPOLD-LEVENTHAL:

Q Directing your attention, Dr. Farmer, to the last two sentences of Mr. Hartman's personal statement, and this appears four lines from the bottom.

A I see that.

Q Okay. Did Mr. Hartman indicate he received double time in medical school for clinical exams?

A Yes, he did.
Q And did Mr. Hartman also indicate that that was sufficient, that double-time accommodation, to enable him to complete the history and the physical examinations on those patients?
A That's my view of it, yes.
Q Okay. You also mentioned a speech pathology report from Stoneybrook from a Ms. Oldemeyer; is that correct?
A Yes, from Ms. Oldemeyer.
Q Please turn to Exhibit Tab 4.
A (Witness complies.)
I have it.
Q Is this Ms. Oldemeyer's report that Mr. Hartman submitted along with his accommodations request?
A Yes, it looks like it's all here.
Q And did you review that report in conjunction with your review of Mr. Hartman's accommodations request?
A Yes, I did.
MS. LEOPOLD-LEVENTHAL: I'd like to mark the document as Tab 4 as Defendant's Exhibit 11, and move it into evidence at this time.
THE COURT: All right.
(Defendant's Exhibit No. 11 was admitted.)
BY MS. LEOPOLD-LEVENTHAL:
Q Please, if you would, Doctor, turn to Page 3 of Ms.

Oldemeyer's report?

A (Witness complies.)

I have it.

Q And there's only one section there and it's entitled "Recommendations."

What did Ms. Oldemeyer recommend at that time in her report with respect to Mr. Hartman's speech dysfluency?

A Actually, she didn't recommend anything. Her recommendations actually seem to indicate that she was summing up.

If I can read, the first recommendation states: "Patient requires more time to verbally communicate, to familiar and unfamiliar listeners, due to his dysfluencies, including halting speech and sound repetition."

Q Did you understand Ms. Oldemeyer's report was being submitted in support of Mr. Hartman's request for more time on a Step 2 CS exam?

A Well, given the date on the evaluation was a year prior, that it was not addressed -- did not address the Step 1 CS, my understanding was that he had received this, perhaps, for another purpose, but was submitting it on behalf as supporting documentation.

Q And I believe you testified that Mr. Hartman also submitted a certification of prior test accommodations; is that correct?

A That's correct.
Q Please turn to Exhibit Tab 5 in the binder in front of you?
A (Witness complies.)
I have that.
Q Identify that document for the Court?
A This is a form that the National Board uses. It's called a certification of prior test accommodations, and we ask individuals requesting test accommodations to have their school or schools complete this form, just to inform us what accommodations they have provided for the student in the past.
Q And who signed this certification on behalf of Stoneybrook?
A I read the name as Letha Shongrin (ph), M.D., Associate Dean for Academic and Faculty Affairs.
Q And that was dated July 2008, correct?
A That's correct.
Q So was it your understanding that that was prepared somewhat contemporaneously with Mr. Hartman's accommodations request?
A That's my assumption, yes.
Q And do you believe this is a true and correct copy of the original certification that Mr. Hartman submitted?
A It looks like it, yes.

MS. LEOPOLD-LEVENTHAL: I would like to mark the document as Exhibit Tab 5, as Defendant's Exhibit 12, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 12 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q And did Associate Dean Shongrin confirm that Mr. Hartman had received extended time for oral examinations?

A Yes, she did.

Q And what did she indicate was the reason for the extended time on those oral examinations?

A Moderate speech dysfluency.

Q Now, you indicated that Mr. Hartman was seeking double time in this July 2008 request, correct?

A Correct.

Q And how much time is included in the standard administration for each SP encounter?

A The standard patient encounter is 15 minutes.

Q So if my math is correct, he was asking basically for double time?

A He was asking for 30 minutes. Double time, correct.

Q Okay. Did you, after you received Mr. Hartman's request for more time, consult with an outside consultant, as to whether an accommodation for Mr. Hartman's speech dysfluency was appropriate?

A I did, yes.
Q And whom did you consult with?
A Dr. Laura Wilbur.
Q Why did you select Dr. Wilbur?
A Dr. Wilbur consults for us in instances from speech, language, and hearing impairments.
Q Were you familiar with Dr. Wilbur's credentials at the time you submitted Mr. Hartman's file to her for review?
A I was.
Q How many times per year, approximately, do you consult with Dr. Wilbur regarding speech issues and accommodations?
A Regarding speech issues and accommodations?
Q Yes.
A Mm, probably less than five times a year.
Q Why did you believe that she was an appropriate person with whom to consult with respect to Mr. Hartman's accommodation request?
A That is her training and experiences in both otology and speech language.
Q If you would, please, turn to Exhibit 6 in the binder in front of you?
A (Witness complies.)
I have that.
Q Identify this document, please?
A This appears to be Dr. Laura Ann Wilbur's data.

Q And do you believe, to the best of your knowledge, that this is a current copy of the C.V.?
A Yes, I do.
Q Okay.
MS. LEOPOLD-LEVENTHAL: I'd like to mark Dr. Wilbur's C.V. at Tab No. 6 as Defendant's Exhibit 13, and move it into evidence?
THE COURT: Good.
(Defendant's Exhibit No. 13 was admitted.)
BY MS. LEOPOLD-LEVENTHAL:
Q And do you understand that the NBME produced this curriculum vitae to the plaintiff in this case?
A I do.
Q Did Dr. Wilbur -- first, what information did you provide to Dr. Wilbur in order to educate her with respect to Mr. Hartman's accommodations request?
A Dr. Wilbur was provided with all the documentation that Mr. Hartman submitted to the National Board.
Q Incidentally, was Mr. Hartman requesting an accommodation about the same time on another examination under the USMLE heading?
A Yes, he was.
Q And what test was he seeking accommodations for in addition to the Step 2 CS?
A A Step 2 CK, the clinical knowledge exam.

Q And what was the basis for Mr. Hartman's request for accommodations on the Step 2 CK exam?
A That was also a reading disorder. In fact, I think it's also on the certification of prior test accommodations that Dr. Shondra indicated the school provided him accommodations on that basis.
Q Are you familiar with the MCAT examination?
A Somewhat, yes.
Q Is that a written examination?
A That's my belief, yes.
Q Okay. And with respect to the MCAT examination, and the SATs, is it your understanding when Mr. Hartman submitted his application, that he had not received any type of accommodation on either one of those examinations for any reading disorder?
A My recollection is he had not received any accommodations on anything prior to the second year of medical school.
Q For a reading disorder, correct?
A For a reading disorder.
Q Okay. Did Dr. Wilbur provide you with a written assessment after she reviewed Mr. Hartman's accommodation request?
A Yes, she did.
Q Would you please turn to Exhibit 7?
A (Witness complies.)

I have it.
Q This is a two-page document and it's marked on the second page and the first page "Received August 19th, 2008, from Disability Services"; is that correct?
A That's correct.
Q And is this the evaluation/assessment report that Dr. Wilbur submitted?
A I would actually define it as her review of the documentation and her recommendation to me.
Q And to the best of your knowledge, is this review and recommendation a true and correct copy of the original submitted to the NBME in August of '08?
A Yes, it is.
MS. LEOPOLD-LEVENTHAL: I'd like to mark this review and recommendation at Exhibit Tab 7, as Defendant's Exhibit 14, and move it into evidence at this time.
THE COURT: All right.
(Defendant's Exhibit No. 14 was admitted.)
BY MS. LEOPOLD-LEVENTHAL:
Q Dr. Farmer, what did Dr. Wilbur conclude and recommend in this two-page report?
A She concluded that based on the documentation that was provided by Mr. Hartman, that he had moderate speech dysfluency, and recommended time-and-one-half on the Step 2 CS exam.

Q If you'd take a look at Page 2 of that exhibit, and I am directing you to Paragraph 4, the fifth line down.
A (Witness complies.)
I see that.
Q The sentence begins, "Like most communication, handicap stuttering is not visible, and thus may be misinterpreted by those who have not known persons who stutter as an inability (lack of knowledge) to answer a question, or as an inability to speak English (word finding problem)."
Do you know why Dr. Wilbur included that information in this review and recommendation report?
A I think Dr. Wilbur is a professor at heart, and as a consultant for us, she has in the past provided us additional information on different types of impairments. It's, I think, her opportunity to inform and educate me, and the unit and I actually solicit information like this from the consultants pretty regularly.
Q Could you take a look at the last sentence of that same paragraph. It provides: "For most people who stutter, stress can exacerbate the problem, thus a time oral exam becomes much more difficult for them and for others who do not stutter."
Do you see that?
A I do.
Q Did Mr. Hartman at any time submit a request for

accommodations based upon an anxiety disorder?
A Not to my knowledge.
(Pause.)
Q Are you familiar with what, if any, instructions a standardized patient is given with respect to rating a candidate if the candidate is disabled or using some sort of assistive device?
A Well, my understanding about instructions to the standardized patients is that they are trained on the use of the rating scales, and that they are trained to apply the rating scales consistently across every examinee, regardless of how the examinee looks, or what assistive devices they may use, or what accommodation they may have.
Q And you understood Dr. Wilbur was recommending time-and-a-half to Mr. Hartman?
A That's my understanding, yes.
Q And then what did you do once you reviewed the document that Dr. Wilbur provided, recommending the time-and-a-half accommodation?
A I reviewed the file again in its entirety. What I'm looking for, again, is just any inconsistencies that might be there. My decision at that time was that time-and-a-half was consistent with what had been provided, and I granted the accommodation of time-and-a-half.
I will say that I gave eight minutes rather than

7-1/2 minutes, which would be the 50 percent additional time. And a letter was sent to Mr. Hartman confirming that that accommodation was approved.

Q Why did you approve 50 percent additional time rather than the double time that Mr. Hartman was seeking at that time?

A Again, after reviewing the file more than once, there was nothing in the file that I could find that confirmed Mr. Hartman's report that he had received double time. All the confirmation or all the information from his medical school was not in specific about the amount of time he was given for clinical or objective OSCEs.

Q Once you determined that 50 percent additional time was an appropriate accommodation, what did you do next?

A A letter was generated to Mr. Hartman that informed him of the accommodation that he would receive eight additional minutes on the examination.

Q Please turn to Exhibit 8 in the binder in front of you.

A (Witness complies.)

I see that.

Q And is that the letter that the NBME forwarded to Mr. Hartman granting him 50 percent additional time?

A It is.

Q And when did you say that was dated?

A That letter's dated August 21st, 2008.

MS. LEOPOLD-LEVENTHAL: I'd like to mark that document under Tab 8 as Defendant's Exhibit 15, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 15 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q Did the NBME also communicate the granting of that request to Mr. Hartman in letter form?

A That is the letter. The August 21st, 2008 letter.

Q I'm sorry about that.

After time-and-a-half was granted, did Mr. Hartman then request an additional accommodation on the Step 2 CS examination?

A He did, yes.

Q What did he request?

A He wrote back to us with a new request form asking for something called a TTY or teletypewriter, and for that to be used should he have a telephone encounter on the examination.

Q And when you received that request, what did you do, if anything, as a result?

A I believe along with that request was a letter from a Ms. McCafferty (ph), I believe a speech therapist that works with Mr. Hartman. I reviewed that documentation.

Rather than a TTY device, the accommodation that was approved for Mr. Hartman, in addition to the time-and-a-half,

was to substitute a face-to-face encounter with a live SP for a telephone encounter.

Q Please turn to Exhibit 9.

A (Witness complies.)

I have that.

Q And that's a letter dated December 2nd, 2008, from the NBME to Mr. Hartman, correct?

A That's it, yes.

Q And is that the NBME's communication to Mr. Hartman with respect to the accommodation on the telephone encounter?

A It is.

MS. LEOPOLD-LEVENTHAL: I'd like to mark the document at Exhibit Tab 9 as Defendant's Exhibit 16, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 16 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q Dr. Farmer, did the elimination of the telephone encounter constitute a fundamental alteration of the Step 2 clinical skills exam?

A No.

Q Why not?

A Telephone encounters are not on every form of the examination, which means that when the exams are randomly assigned to examinees, not every examinee will receive a

telephone encounter.
Q And is it your understanding then that Mr. Hartman took the Step 2 clinical skills examination in June of 2009?
A That's my understanding, yes.
Q And how did Mr. Hartman do on that exam?
A He failed the overall examination.
Q Do you know how he did on the three subcomponents that comprise the overall grade?
A Yes, he passed the spoken English proficiency or SEP portion, the integrated clinical encounter or ICE portion, and he failed the CIS, the communication and interpersonal skills portion.
Q To the best of your knowledge, did anyone from the NBME hear from Mr. Hartman after he took the Step 2 CS examination in June, but before his actual score was released?
A No, not to my knowledge.
Q So is it fair to say that Mr. Hartman, to the best of your knowledge, didn't contact the NBME either in writing, or over the telephone, to complain about not having enough time, or feeling rushed during a patient encounter, or complaining about any other aspect of the administration of that exam?
A My understanding is that we received no information from Mr. Hartman about that, no.
Q Do you understand that Mr. Hartman took the Step 2 CK and the Step 2 CS examinations the same week?

A That's my understanding, yes.
Q Do you know how many hours the administration of the Step 2 CK takes?
A A Step 2 CK is a nine-hour examination. It's a nine-hour day. Eight one-hour test blocks and 45 minutes of break time.
Q And how long is the Step 2 CS examination?
A Well, the standard administration would be also around eight hours. With time-and-a-half accommodation, it would add another 50 percent time to that.
A And, so, when Mr. Hartman took the Step 2 CS examination in June of 2009, with the time-and-a-half, did he take that examination all in one day?
A I believe so, yes.
Q And after Mr. Hartman's score was released then, did he submit a letter with a request for different accommodations to the NBME?
A After his score was released, yes, he submitted a letter and a new request form.
Q Please turn to Exhibit 13 in the binder in front of you.
A (Witness complies.)
I have that.
Q And what is that document, Dr. Farmer?
A This is a one-page letter dated September 17th, 2009, from Aaron Hartman to the testing coordinator.

Q And, to the best of your knowledge, is this a true and correct copy of the original that Mr. Hartman submitted to the NBME at that time?

A Yes, it is.

MS. LEOPOLD-LEVENTHAL: I'd like to mark this document as Exhibit Tab 13, as Defendant's Exhibit 17, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 17 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q Dr. Farmer, please take a look at the second paragraph of Mr. Hartman's letter, and I'm directing your attention to the first sentence, which provides: "I have reapplied for the Step 2 CS examination with alternative accommodations. I would like to type my questions and responses to the SP via a laptop computer and have a orator verbalize what I type to the SP. I would also like the SP rating scales to be modified."

And is it fair to say that your understanding at that time was that Mr. Hartman was asking both for a modification of the rating scales, and also that he be permitted to type his communication on a computer, and then another individual would speak what was typed?

A That is my understanding, yes.

Q Did Mr. Hartman also request that he be permitted to

speak one sentence to the SP, and then type the rest of the encounter with the use of the orator, as I've described?

A Yes, in the next to the last paragraph in this letter, it appears that Mr. Hartman is attempting to provide some suggestions on how the spoken English proficiency portion of the exam might be handled, and in that case it was to speak a limited amount to the SP.

Q Did Mr. Hartman submit a request for accommodations form along with that letter seeking the orator?

A Yes, he did.

Q Please turn to Exhibit 11. I'm sorry. I'm a little out of order here.

A (Witness complies.)

I have that.

Q And is that the request for accommodations form that Mr. Hartman submitted that time?

A It is.

MS. LEOPOLD-LEVENTHAL: I'd like to mark that request for accommodations as Defendant's Exhibit 18. It's at Tab No. 11. And move it into evidence at this time.

(Defendant's Exhibit No. 18 was admitted.)

THE WITNESS: Ms. Leopold-Leventhal, may I clarify?

BY MS. LEOPOLD-LEVENTHAL:

Q Please.

A -- the date stamp on this document is October 5, 2009.

We received this form in September. I believe this is a copy that Mr. Hartman also sent along with a letter to somebody else at the National Board, perhaps Ms. Osring (ph), but it is a copy of the same form that he submitted with his letter that we received in September.

Q And if you'd turn to Page 3 of that exhibit, what accommodation was Mr. Hartman requesting?

A On the patient encounter section, he was requesting to type his questions and responses to the SP via a laptop computer, and have an orator verbalize what he typed to the SP. He was also asking that the SP rating scales be modified, so that the use of the orator would not negatively impact his score.

Q Could you take a look at the next page. Does Mr. Hartman describe the accommodations he had previously received with respect to oral examinations?

A Yes, he does.

Q And what did he indicate?

A In medical school he received extended time for oral exams, for objective standardized clinical exams or OSCEs, he was given double time to complete the patient encounter.

Q Have you since learned, Dr. Farmer, that, in fact, at least on one examination Stoneybrook Medical School granted Mr. Hartman only time-and-a-half and not double time to complete an oral examination?

A I have.
Q Did he ever -- did Mr. Hartman ever supplement his request for accommodations to provide the NBME with that piece of information?
A Not the Office of Disability Services, no.
Q Okay. And did Mr. Hartman also submit a letter from a new speech pathologist at that time in support of his orator request?
A I believe what he submitted was another letter or a letter from Ms. McCafferty, his speech therapist. Ms. McCafferty had written a brief letter supporting his request for TTY the year before.

With this request, she wrote a longer letter supporting his -- well, actually come to think of it, I don't know that she actually made any request or recommendation for accommodation.

Q If you would, take a look at the document at Exhibit Tab 14.
A (Witness complies.)

I see that.

Q Is that, to the best of your knowledge, a true and correct copy of the letter that Mr. Hartman submitted to the NBME from Ms. McCafferty in support of his orator request?
A Yes, it is.

MS. LEOPOLD-LEVENTHAL: I'd like to mark Ms.

McCafferty's letter at Exhibit Tab 14, as Defense Exhibit 19, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 19 was admitted.)

(Pause.)

BY MS. LEOPOLD-LEVENTHAL:

Q Did Ms. McCafferty indicate in her letter that stress exacerbates Mr. Hartman's speech dysfluency?

A Yes, she did.

Q And at that time did Mr. Hartman supplement his accommodations request with any information supporting an anxiety disorder?

A No, he did not.

Q Did Mr. Hartman produce any documentation at that time to establish that he had ever used an orator in any point in his life up until that point in time?

A No, he did not.

Q What did the NBME decide with respect to Mr. Hartman's orator request?

A That the request was not supported by the documentation he had provided up until that point.

Q And what did you -- what did the NBME base that decision on?

A Well, the request was actually denied, and what was granted was a double time examination, or a 30 minutes per

patient encounter.
Q Why did the NBME grant Mr. Hartman double time at this point in time?
A I think I was persuaded by both his letter, and Ms. McCafferty's letter, that Mr. Hartman's speech dysfluencies are effected by situations and vary from time-to-time.
Q Did the NBME communicate the denial of the orator request and the granting of double time to Mr. Hartman?
A Yes.
Q Take a look at Exhibit -- the document at Exhibit Tab 15, please.
A (Witness complies.)
I have that.
Q And what is that document?
A That is a letter dated September 29, 2009, from me to Mr. Hartman, and it is informing him that he's been granted an additional 15 minute for patient encounter, but that we are unable to grant his request for an orator, or to modify the rating scales.
Q Well, he was still asking that the rating scales be modified for him?
A I believe that was contained in his request form, yes.
MS. LEOPOLD-LEVENTHAL: I'd like to mark that September 29th, 2009, letter at Exhibit Tab 15 as Defendant's Exhibit 20, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 20 was admitted.)

BY MS. LEOPOLD-LEVENTHAL:

Q Did the NBME issue Mr. Hartman a document called a scheduling permit?

A We did.

Q And what is that document?

A The scheduling permit is required for an examinee to schedule their examination. It tells them what eligibility period they have, so which period of time they have to take their test. It gives them information about how to schedule their examination.

MS. LEOPOLD-LEVENTHAL: May I approach the witness, your Honor?

THE COURT: Yes, indeed.

BY MS. LEOPOLD-LEVENTHAL:

Q Dr. Farmer, is that the scheduling permit that you just referred to with respect to Mr. Hartman?

A This is a copy of his scheduling permit, yes.

Q Okay. And with respect to the eligibility period, what's identified?

A Mr. Hartman is currently eligible to take the Step 2 CS examination between September 28, 2009, and September 28, 2010.

Q So, as I understand it then, the double time

accommodation that the NBME granted to Mr. Hartman on September 28th, 2009, that basically has an effective date for a year through September 28, 2010; is that correct?

A That's correct.

MS. LEOPOLD-LEVENTHAL: Your Honor, this document is not in my exhibit binder, but I would like to mark it as Exhibit 21, and move it into evidence at this time.

THE COURT: All right.

(Defendant's Exhibit No. 21 was admitted.)

THE COURT: Thank you.

MS. LEOPOLD-LEVENTHAL: Your Honor, it's -- this may be a good time for me to break, if that's okay with you. It's about quarter of 6:00. I have probably less than a half an hour left of the witness, but --

THE COURT: All right.

MS. LEOPOLD-LEVENTHAL: -- I would be happy to begin that Monday morning at 8:30, if that's acceptable to you?

THE COURT: All right. Now, in addition to Dr. Farmer, you have --

MS. LEOPOLD-LEVENTHAL: Dr. Clauser who is going to talk about the psychometrics involved. His testimony will be the shortest of the three witnesses for sure.

THE COURT: I see.

MS. LEOPOLD-LEVENTHAL: And that's all.

THE COURT: All right. Do you have a sense of how

long your cross is going to be?

MR. WEINER: I would put it in the neighborhood of a half hour to 45 minutes of Dr. Farmer.

THE COURT: All right. Good. Well, we'll meet then at 8:30 Monday morning. We will be meeting in Judge Bartle's -- back in Judge Bartle's courtroom, which is on the 16th floor.

I was about to say I should apologize to you institutionally for shifting the venues so frequently, but maybe you can take it as a tourist opportunity to see various work sites in the court.

Very good. Have good weekends, folks.

MS. LEOPOLD-LEVENTHAL: Thank you, your Honor.

MR. WEINER: Thank you, your Honor.

THE WITNESS: Thank you.

MR. WEINER: Have a good weekend.

(Court adjourned at 5:46 o'clock p.m.)

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